4285
A.B.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 288

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, APPELLANT,

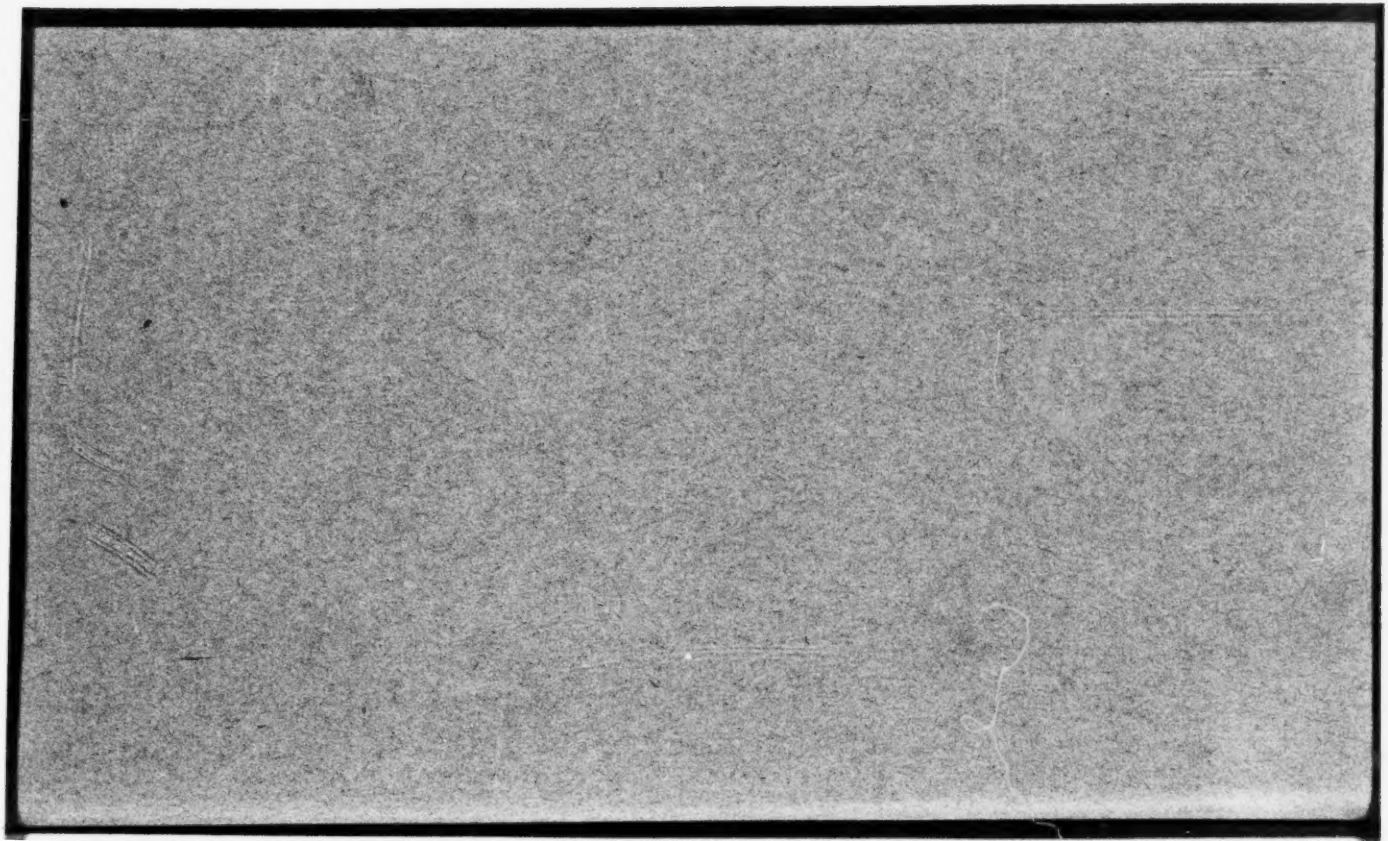
vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

FILED JUNE 7, 1924

(30,401)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1924

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[fol. 1] CITATION—In usual form, showing service on Milton J. Hilmick; filed April 30, 1924; omitted in printing

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[fol. 2] CAPTION—Omitted

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed January 8, 1924

To the Honorable the Judge of the United States District Court for the District of New Mexico:

Fidelity and Deposit Company of Maryland, a body corporate, brings this its bill of complaint against J. M. Luna, Chairman, and Hugh H. Williams and Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of New Mexico, and complaining, says:

1. Your orator, Fidelity and Deposit Company of Maryland, is a corporation duly incorporated under the laws of the State of Maryland and is a citizen of the State of Maryland and a resident of the State and District of Maryland. Each of the defendants is a citizen of the State of New Mexico and a resident of the State and District of New Mexico. The defendant J. M. Luna is the chairman and the defendants Hugh H. Williams and Bonifacio Montoya are members of the State Corporation Commission of New Mexico and these three defendants constitute the State Corporation Commission of New Mexico. The defendant L. B. Gregg is the State Bank Examiner of New [fol. 3] Mexico. This is a suit of a civil nature in equity arising under the Constitution of the United States and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000).

2. Your orator is a corporation with full corporate power to do a general bonding and surety business and to become surety on the bonds of employees of individuals, co-partnerships or corporations as well as public officers and generally to execute as principal or surety bonds guaranteeing the performance of contracts or sundry other undertakings, obligations or duties of individuals, co-partnerships or corporations. As such a corporation your orator is and for many years has been engaged in transacting its said business in various states throughout the United States, including the State of New Mexico. Your orator is, within the meaning of the laws of New Mexico relating to insurance, a foreign insurance company authorized to do business in New Mexico.

3. Section 1 of Article XI of the Constitution of the State of New Mexico provides:

"A permanent commission to consist of three members is hereby created, which shall be known as the 'State Corporation Commission.'"

Section 6 of the same Article provides, among other things:

"Subject to the provisions of this constitution, and of such requirements, rules and regulations as may be prescribed by law, the state corporation commission shall be the department of government through which shall be issued all charters for domestic corporation and amendments or extensions thereof, and all licenses to foreign [fol. 4] corporations to do business in this state; and through which shall be carried out all the provisions of this constitution relating to corporations and the laws made in pursuance thereof * * *. All charters, papers and documents relating to corporations on file in the office of the secretary of the territory, the commissioner of insurance and all other territorial offices, shall be transferred to the office of the commission."

Section 2807 of the New Mexico Code of 1915 is a codification of part of an act passed some years prior to the adoption of the Constitution of the State of New Mexico. Section 2807 provides, among other things:

"It shall be the duty of the superintendent of insurance * * * to issue certificates of authority to transact insurance business to any insurance companies which have fully complied with the laws of this State, and to issue such other certificates as required by law in the organization of insurance companies and the transaction of the business of insurance and generally to do and perform with justice and impartiality all such duties as are or may be imposed on him by the laws in relation to the business of insurance in this state; * * *."

Section 2814 of the New Mexico Code of 1915 provides, among other things:

"No company shall transact in this State any insurance business unless it shall procure from the Superintendent of Insurance a certifi- [fol. 5] cate stating that the requirements of the laws of this State have been complied with, and authorizing it to do business. Said certificate shall expire on the last day of February in each year, and must be renewed annually. Every such company shall be required to procure annually for the use of its agents and solicitors copies of such certificate of authority, and any person soliciting business or any company authorized to transact business in this State without first procuring a certificate from the superintendent of insurance, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of one hundred dollars for each and every offence. * * *"

Section 2815 of the New Mexico Code of 1915 provides, among other things, that an insurance company not incorporated or organized under the law of New Mexico shall, before permission is given to transact business and before the renewal of its certificate of authority, file a certificate signed by its president or chief officer to the effect that all the provisions of Chapter LVIII (relating to insurance) of said Code are accepted by it as a part of the conditions of its right and authority to transact business in New Mexico.

Section 2861 of the New Mexico Code of 1915 provides:

"It shall be the duty of the Superintendent of Insurance to revoke the authority to do business in this State of any corporation, firm or association, violating or failing to comply with any of the provisions of this chapter, or any of whose agents fail to comply with or violate any of the provisions of this chapter. And no such corporation, firm or association shall be authorized to write any insurance in this state for the period of one year after such revocation."

[fol. 6] Each of the sections hereinbefore mentioned and also Section 2820 hereinafter mentioned of the New Mexico Code of 1915 are part of Chapter LVIII thereof entitled "Insurance."

Section 22 of Chapter 56 of the New Mexico Laws of 1917 provides:

"The State Corporation Commission shall have control and supervision of the State Bank Examiner and the records and files of his office."

Section 2 of Chapter 47 of the New Mexico Laws of 1921 provides:

"That all the powers and duties prescribed by law and vesting in or resting upon the Insurance Department of the State of New Mexico and the Superintendent thereof shall be forthwith vested in and performed by the State Bank Examiner of the State of New Mexico."

4. Your orator has for many years been transacting and is now transacting business in the State of New Mexico and in the conduct of such business has at all times complied with the laws of the State of New Mexico and has from time to time procured and had renewed annually, pursuant to the laws of the State of New Mexico and especially to Sections 2814 and 2815 of the New Mexico Code of 1915, a certificate authorizing your orator to do business in the State of New Mexico. Under the laws of New Mexico and especially under said Section 2814 your orator's certificate now in force will expire on the last day of February in the year 1924. Your orator, however, avers that under the laws of New Mexico and upon compliance with the provisions thereof your orator is entitled to continue to do business in New Mexico and to procure another annual renewal of its certificate from and after the last day of February, 1924. The present value of the business done by your orator in

the State of New Mexico or of the right to continue to do business [fol. 7] in the State of New Mexico in compliance with the laws of New Mexico exceeds the sum of five thousand dollars ($5,000).

3. Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the New Mexico Laws of 1921, provides:

"It shall be unlawful for any foreign insurance company to make, write, place or cause to be made, written or placed in this State, any insurance policy or contract of any kind to provide against any contingency which may be insured or guaranteed against, unless the same shall be made, written or placed through its duly and regularly appointed and authorized agent or agents, resident of this State. It shall be unlawful for any insurance company authorized to do business in New Mexico, its representative, manager, general agent, special agent, local agent, broker or solicitor, to pay or promise to pay, either directly or indirectly any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this Section shall have its certificate of authority to do business in this State suspended for not less than one year, and such suspension shall be removed and the said certificate of authority renewed only upon a written pledge from the directors or executive body in authority over the officers of such company that this Section will be fully and faithfully observed."

[fol. 8] 6. Since Section 2820 was enacted your orator has not made, written, placed or caused to be made, written or placed in the State of New Mexico any insurance policy or contract of any kind to provide against any contingency which may be insured or guaranteed against unless the same has been made, written or placed through your orator's duly and regularly appointed and authorized agent or agents, residents of the State of New Mexico. In many cases, however, in the course of the conduct of your orator's business services of value have been and are rendered to your orator by its agents or officers or employees in other states in connection with the procurement of business made, written and placed as aforesaid in New Mexico. Your orator's agents or branch offices in states other than New Mexico frequently have received and do receive applications from residents of such states other than New Mexico for bonds guaranteeing the fidelity of New Mexico employees of such applicants. In such cases your orator's agents or branch offices in states other than New Mexico transmit such business to New Mexico and the bonds are executed by the New Mexico employees of the applicants and are made, written and placed by your orator in New Mexico through your orator's agents, residents of New Mexico. In such cases, however, the services rendered your orator by its agents or branch offices in states other than New Mexico are of value to your orator and necessarily must be, have been and are paid for. In the

case of branch offices such services are part of the regular services for which your orator's branch office officers and employees receive regular salaries or compensation. In the case of agencies such services are paid for by commissions on such basis as is agreed upon, outside of New Mexico, between your orator and its agents.

7. The defendant L. B. Gregg, as State Bank Examiner of New Mexico, has asserted and still asserts that the payments made as aforesaid by your orator to its agents in states other than New Mexico for the services rendered in connection with the procurement of business made, written and placed in New Mexico under the circum-
[fol. 9] stances set forth in the aforegoing paragraph 6 of this bill of complaint constitute a violation by your orator of the following provision of Section 2820 (as amended) of the New Mexico Code of 1915.

"It shall be unlawful for any insurance company authorized to do business in New Mexico, its representative, manager, general agent, special agent, local agent, broker or solicitor, to pay or promise to pay, either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico."

Said defendant L. B. Gregg, as State Bank Examiner of New Mexico, also has asserted and still asserts that said Section 2820 (as amended), as so construed by him and as so applied to said payments by your orator, is valid legislation and that, under the laws of New Mexico and especially under the provisions of said Section 2820 (as amended) and other provisions of the constitution and laws of New Mexico hereinbefore in this bill of complaint set forth, it is the right and duty of said defendant to request the other defendants as the State Corporation Commission of New Mexico to suspend or undertake or attempt to suspend, or to cooperate with said other defendants as the State Corporation Commission of New Mexico in suspending or undertaking or attempting to suspend, for not less than one year your orator's certificate of authority to do business in the State of New Mexico. Said defendant L. B. Gregg, as State Bank Examiner of New Mexico, accordingly on or about the 14th day of November, 1923, requested the other defendants, as the State Corporation Commission of New Mexico, to suspend the right of your orator to transact business in New Mexico for the period of one year from the 19th day of November, 1923, which request was
[fol. 10] afterwards amended by said defendant so that the requested period of suspension should begin on the 8th day of January, 1924.

8. When said defendant L. B. Gregg, as State Bank Examiner, so made and so amended said request to the other defendants, as the State Corporation Commission of New Mexico, your orator was

given an opportunity to appear before said other defendants, as the State Corporation Commission of New Mexico, and show cause why the said request should not be granted. Availing itself of such opportunity your orator showed, as cause why said request should not be granted, that your orator is advised that by virtue of the Fourteenth Amendment of the Constitution of the United States the State of New Mexico has no right whatsoever to control, regulate or prohibit your orator's contracts, agreements or arrangements, made outside of New Mexico, concerning compensation of its officers, employees or agents who do not reside in New Mexico for services rendered wholly outside of the State of New Mexico and that, if Section 2820 of the New Mexico Code of 1915 (as amended) be construed as prohibiting or declaring unlawful the payment by your orator of compensation to its officers, employees and agents outside of New Mexico under the circumstances and for the services mentioned, then this Section, as so construed and applied, is contrary to the Fourteenth Amendment of the Constitution of the United States and is therefore null and void.

9. Notwithstanding the cause so shown by your orator the defendants J. M. Luna, as Chairman, and Hugh H. Williams and Bonifacio Montoya, as members, of the State Corporation Commission of New Mexico, constituting the State Corporation Commission of New Mexico, have determined and intend to grant the request of the defendant L. B. Gregg, as State Bank Examiner of New Mexico, and have determined and intend to suspend or to undertake or at-[fol. 11] tempt to suspend for the period of one year from the 8th day of January, 1924, the right and the certificate of authority of your orator to do business in the State of New Mexico. The sole reason of said defendants for the action so proposed to be taken by them is the fact that your orator made the payments, to its agents in states other than in New Mexico, hereinbefore in paragraph 6 of this bill of complaint fully mentioned.

10. Your orator therefore avers that, unless restrained by this Honorable Court, the defendants, as the State Corporation Commission of New Mexico and as the State Bank Examiner of New Mexico respectively, will on the 8th day of January, 1924, or shortly thereafter, suspend for the period of one year your orator's certificate of authority to do business in the State of New Mexico and will therefore at the end of February, in the year 1924, refuse to renew your orator's present certificate of authority, and will thereby undertake and attempt, and assert the right, to suspend the right of your orator to do business in the State of New Mexico during said period of suspension, and even after the expiration of said period of suspension, will continue to deny the right of your orator to do business and will undertake and attempt to prevent your orator from doing business in the State of New Mexico, except in compliance with the provisions of said Section 2820 (as amended) as so construed and applied by said defendants. Thereby, unless said defendants are restrained by this Honorable Court, your orator's valuable right to do business in the State of New Mexico and your orator's valuable

business in said State will be wholly destroyed, since your orator could not after such suspension or attempted suspension of its certificate of authority to do business in New Mexico continue to do business in New Mexico in view of the provisions of Section 2814 of the New Mexico Code of 1915, whereby not only your orator but also any person soliciting business for it in the State of New Mexico would become liable to a fine of one hundred dollars for each and every offense of so transacting or soliciting business in New Mexico in case [fol. 12] such attempted suspension of your orator's certificate of authority should ultimately be held lawful and valid.

11. Your orator avers that by virtue of the Fourteenth Amendment of the Constitution of the United States the State of New Mexico has no right whatsoever to control, regulate or prohibit your orator's contracts, agreements or arrangements, made outside of New Mexico, concerning compensation of its officers, employees or agents who do not reside in New Mexico for services rendered wholly outside of the State of New Mexico and that Section 2820 (as amended) of the New Mexico Code of 1915, if construed and applied (as the defendants construe and apply it) as prohibiting or declaring unlawful the payment by your orator of compensation to its officers, employees and agents outside of New Mexico under the circumstances and for the services hereinbefore set forth, would deprive your orator of its liberty and property without due process of law and would deny to your orator the equal protection of the law and is therefore null and void.

12. In view of the fact that the defendants intend on the 8th day of January, 1924, or shortly thereafter, to suspend your orator's certificate of authority to do business in the State of New Mexico, immediate and irreparable loss and damage to your orator would result from such suspension before this matter can be heard on application for a preliminary injunction after notice to the defendants.

To this end, therefore:

1. That the aforesaid Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the Laws of 1921, approved March 14, 1921, in so far as it prohibits or declares unlawful the payment by your orator of compensation to its officers, employees or agents not residents of the State of New Mexico for services rendered wholly outside of the State of New Mexico in connection with the procurement of business made, written and placed by your orator [fol. 13] in the State of New Mexico, and in so far as it undertakes to empower and authorize the defendants or any of them to suspend your orator's certificate of authority to do business in the State of New Mexico because of such payments to such non-residents of the State of New Mexico, be declared unconstitutional and void.

2. That the defendants, J. M. Luna, chairman, and Hugh H. Williams and Bonifacio Montoya, members, of the State Corporation Commission of New Mexico, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of

New Mexico, and their respective successors in office, deputies, clerks and attorneys and all persons acting under their authority, may be perpetually, and also preliminarily pending this suit, restrained and enjoined from suspending or attempting to suspend your orator's certificate of authority to do business in the State of New Mexico or from taking any further steps to that end, and from refusing to renew your orator's said certificate at the expiration thereof at the end of February in the year 1924 upon compliance by your orator with all the requirements of the laws of the State of New Mexico relating to the renewal of such certificates, except the provisions of Section 2820 (as amended) of the New Mexico Code of 1915 in so far as they are, as your orator herein avers, unconstitutional and void and except also the provisions of Section 2815 of said Code in so far as said provisions may purport to require, as a part of the conditions of your orator's right and authority to transact business in the State of New Mexico, the acceptance of said unconstitutional and void provisions of said Section 2820 (as amended).

3. And that your orator may have such other and further relief in the premises as its case may require.

May it please your honor to grant unto your orator the writ of subpœna directed to the defendants and each of them commanding them to be and appear in this Honorable Court on some certain day [fol. 14] to be named therein and to answer the premises and to abide by and perform such order or decree as this Honorable Court may make in the premises.

And as in duty bound your orator will ever pray.

C. J. Roberts, Solicitor for Plaintiff, Santa Fe, New Mexico.

Jurat showing the foregoing was duly sworn to by C. J. Roberts omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed January 9, 1924

Now comes the plaintiff in the above entitled case, Fidelity and Deposit Company of Maryland, by C. J. Roberts, its solicitor, and moves this Honorable Court to grant a writ of injunction against the defendants and each of them and their respective successors in office, deputies, clerks, attorneys and all persons acting under their authority, pending this suit and until the further order of the Court, conformably to the prayer of the bill in said case filed.

C. J. Roberts, Solicitor for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING SERVICE OF NOTICE OF APPLICATION FOR PRELIMINARY INJUNCTION—Filed January 9, 1924

It is stipulated and agreed by and between the plaintiff herein, appearing by C. J. Roberts, its attorney, and the defendants herein, appearing by Milton J. Helmick, Attorney General of the State of New Mexico, that service of formal notice of application for preliminary injunction, as prayed for in the bill of complaint herein, upon said defendants and the Honorable James F. Hinkle, Governor, and the Honorable Milton J. Helmick, Attorney General, of New Mexico, is hereby waived, the Attorney General of the State of New Mexico having entered his appearance for all of said parties in accordance with stipulation this day signed and filed.

C. J. Roberts, Attorney for Plaintiff. Milton J. Helmick, Attorney General of the State of New Mexico, for said Defendants and the Governor.

Approved: Colin Neblett, Judge.

[fol. 16] IN UNITED STATES DISTRICT COURT

STIPULATION ENTERING APPEARANCE FOR DEFENDANTS AND WAIVING THE ISSUANCE AND SERVICE OF PROCESS AND FOR CONTINUANCE OF PRELIMINARY INJUNCTION UNTIL FINAL HEARING AND APPROVAL BY THE COURT OF THE SAME—Filed January 9, 1924

It is hereby stipulated and agreed between the parties hereto, plaintiff appearing by C. J. Roberts, its attorney, and the defendants appearing by Milton J. Helmick, Attorney General, as follows:

1. The defendants waive the issuance and service of process herein, and enter an appearance, reserving, however, any right to object to the jurisdiction of the Court over the persons and subject matter upon any ground other than that no service of process *have* been entered.

2. It is further stipulated and agreed that the preliminary restraining order issued this day by the Court shall continue in full force and effect until the final hearing herein.

3. It is further stipulated and agreed that the hearing of the application for the preliminary injunction before the Honorable Robert L. Lewis, United States Circuit Judge for the Eighth Circuit, and the Honorable Orie L. Phillips, United States District Judge of New Mexico, and His Honor Judge Colin Neblett, is hereby waived, and said restraining order is continued until said cause is heard upon its merits.

C. J. Roberts, Attorney for Plaintiff. Milton J. Helmick, Attorney for Defendants.

Approved this 9th day of January, 1924. Colin Neblett, United States District Judge.

[fol. 17] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed January 9, 1924

Upon reading the bill of complaint and affidavit herein, it appearing from the facts shown by the verified bill that before notice can be served and a hearing had on the plaintiff's application for a preliminary injunction herein or on the plaintiff's application for a restraining order immediate and irreparable injury, loss and damage will result to the plaintiff, to wit, that on the 8th day of January, 1924, or shortly thereafter, the plaintiff's certificate of authority to do business in the State of New Mexico will be suspended, now, therefore, it is adjudged and ordered that the defendants, J. M. Luna, Chairman, and Hugh H. Williams and Bonifacio Montoya, members of the State Corporation Commission, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner, and each of them and their respective successors in office, deputies, clerks, and attorneys and all persons acting under their authority be and the and each of them hereby are restrained and enjoined from suspending or attempting to suspend the plaintiff's certificate of authority to do business in the State of New Mexico or from taking any further steps to that end. This restraining order shall become effective upon the giving of security by the plaintiff by filing a bond in the sum of Five Thousand dollars conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. This restraining order shall remain in force only until the hearing and determination of the application for a preliminary injunction herein and shall expire within ten days after entry unless within said time it is extended for a like period for good cause shown. The matter of the issuance of a preliminary injunction herein is hereby set down for hearing on the 19th day of Janu-[fols. 18 & 19] ary, 1924, at 10 o'clock A. M.

It is further ordered that a copy of this order be served upon the defendants and also upon the Governor of the State of New Mexico and the Attorney-General of the State of New Mexico.

And I hereby designate the Honorable Robert L. Lewis, United States Circuit Judge for the Eighth Circuit, and the Honorable Orie L. Phillips, United States Dist. Judge, Judge for New Mexico to sit with me at the hearing of the application for the preliminary injunction.

Issued and entered at 10 o'clock A. M., this 9th day of January, 1924.

Colin Neblett, United States District Judge.

Approved.

BOND ON INJUNCTION FOR $5,000—Approved and filed January 9, 1924; omitted in printing

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[fol. 20] IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 10, 1924

Come now defendants in the above entitled cause and present this their answer to the bill of plaintiffs.

Defendants first move the court to dismiss the bill filed in this cause because said bill does not state any matter of equity entitling plaintiff to relief prayed for nor are the facts stated in the bill sufficient to entitle plaintiff to any relief whatever against these defendants.

Defendants move the court to dismiss the bill on the further ground that it affirmatively appears on the face of the said bill that this court is wholly without jurisdiction in the premises.

[fol. 21] Defendants move the court to dismiss the bill filed in this cause for the further reason that it appears from the face of the bill that the same does not question the validity or constitutionality of any law of the State of New Mexico but, on the contrary, the said bill purports and pretends to question a mere construction of certain statutes of the State of New Mexico and the administrative acts of officers of the State of New Mexico.

Defendants move the court to dismiss the bill filed in this cause because the statutes of the State of New Mexico which the said bill purports and pretends to attack are statutes of a familiar character enacted by many states of the Union and are obviously fair and valid legislation under the police power of the State of New Mexico, and not in conflict with any prohibition of the Constitution of the United States or State of New Mexico.

And defendants, not waiving any of the foregoing motions and objections and not waiving any of the manifest insufficiencies of the bill, for further answer:

I

Admit the contents of paragraph 1 excepting the last sentence thereof and as to the allegations contained in the last sentence, these defendants say that they are without information sufficient to form a belief as to whether or not the matter in controversy exceeds exclusive interest, in cost the sum of $300.00, and therefore defendants on information and belief deny the last sentence of the said paragraph.

II

Admit the contents of paragraph 2 of the bill.

III

Admit the contents of paragraph 3 of said bill, but show in this connection that there are various other and further provisions of

the Constitution of the State of New Mexico and statutes of the State of New Mexico relating to the official duties of these defendants and [fol. 22] to the regulation of corporations of the same class as plaintiff, which said constitutional provisions and statutes are too lengthy to be set out in full and consequently these defendants pray leave of the court to submit and prove such of these statutes as may become pertinent on the trial of this cause.

IV

Admit that plaintiff has been transacting business in New Mexico for many years, but deny that it has at all times complied with the laws of the State of New Mexico. Deny that plaintiff is entitled to continue to do business in New Mexico and to procure a renewal of its certificate from and after the first day of Feb. 1924. State that they have no information sufficient to form a belief as to the present value of business done by plaintiff in the State of New Mexico or of the right to continue business in the State of New Mexico or whether said right exceeds the sum of $5,000.00 and consequently defendants deny such allegations on information and belief.

V

Admit the contents of paragraph 5 of the bill.

VI

Deny the first sentence of paragraph 6 of the bill. Admit the remainder of the contents of paragraph 6 except defendants deny that the service mentioned by agents and branch offices other than New Mexico necessarily must be paid for.

VII

Admit the contents of paragraph 7 except that defendants deny that the defendant Gregg has at any time placed any peculiar or individual construction upon said statute in performing the acts mentioned in said paragraph but, on the contrary, defendants show that the plain, ordinary and fair construction of the said statute applied to the admitted acts of the plaintiff, necessarily establishes that plaintiff has been guilty of a violation of the said Act.

[fol. 23] VIII

Admit the first sentence of paragraph 8, but deny all the allegations and conclusions contained in the remainder of the paragraph, and as to such conclusions, these defendants say that the same should be stricken.

IX

Admit the contents of paragraph 9.

X

Admit the contents of paragraph 10 except that these defendants deny that they or any of them make or insist upon any individual or peculiar construction and application of Sec. 2820 but, on the contrary, these defendants show that they have not and will not make any individual or peculiar construction of the said section, but only the ordinary, obvious and fair construction, which said section necessarily calls for.

XI

Deny all the contents of paragraph 11 of the bill.

And these defendants further answering, show and allege:

I

That the said statutes of the State of New Mexico cited, quoted and plead by plaintiff are each and all of them familiar laws enacted in substantially like form in many of the states of the United States and that such statutes are obviously fair and valid legislation enacted in pursuance of the police power of the State of New Mexico and not in contravention of any provision of the Constitution of the United States or State of New Mexico.

II

That these defendants or any of them have not placed any individual, strained or unusual construction upon the fair, plain and obvious meaning of the words of the said statutes, but plaintiff, by its bill, seeks to attack the administrative acts of these defendants merely, and not the validity of the said statutes, but defend- [fol. 24] ants show that the acts of these defendants are necessarily in full conformity with the said statutes and that therefore plaintiff having specifically neglected to attack the validity of the statutes has attacked nothing, and hence has asserted no right to any relief which this court may grant.

III

That the admitted acts of plaintiff disclosed on the face of its bill constitute clear violations of the provisions of the said statutes of the State of New Mexico and justify the official acts of these defendants in suspending plaintiff as alleged in the bill.

IV

That these defendants, as officials of the State of New Mexico, and the State of New Mexico, have been damaged by the issuance of the writ of injunction herein at the instance of the plaintiff in the sum of $500.00.

Wherefore, these defendants pray judgment against plaintiff and its bondsmen in the sum of $500.00; that the bill of plaintiff may be dismissed; that the injunction heretofore issued may be quashed

and that defendants go forth without day and have their costs herein expended.

Milton J. Helmick, Attorney General of New Mexico, Attorney for Defendants, Santa Fe, New Mexico.

Jurat showing the foregoing was duly sworn to by Bonifacio Montoya omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

REPLY—Filed March 10, 1924

Comes now the plaintiff in the above entitled cause and for reply to paragraph IV of said defendants' further answer, denies that said defendants, or the State of New Mexico, or any of them have been damaged by the issuance of the writ of injunction herein in the sum of $500.00, or in any sum.

C. J. Roberts, Attorney for Plaintiff, Santa Fe, New Mexico.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR RENEWAL OF CERTIFICATE OF PLAINTIFF TO DO BUSINESS IN NEW MEXICO PENDING FINAL DETERMINATION OF THIS CASE—Filed February 27, 1924

Whereas, the plaintiff's certificate of authority to do business in the State of New Mexico expires on or about the 28th day of February, 1924, and if said plaintiff continues to do business in the State of New Mexico pending the determination of this case, its said certificate of authority will be required to be renewed by the State Corporation Commission, and,

Whereas, its right to a renewal is dependent upon the final determination of the issues in this cause in favor of said plaintiff, and,

Whereas, said plaintiff in its bill has asked the court to enjoin and restrain said Corporation Commission from refusing to renew plaintiff's certificate of authority to do business in the State of New Mexico,

It is therefore, stipulated and agreed between the parties hereto, the plaintiff being represented by C. J. Roberts, its attorney, and [fol. 26] the defendants being represented by Milton J. Helmick, Attorney General of the State of New Mexico, as follows:

1. The State Corporation Commission shall renew the certificate of authority of the plaintiff to do business in the State of New Mexico from month to month, pending the final determination of this case.

2. Upon final determination of this case, if the defendant shall prevail, the right of the plaintiff to do business under said certificate shall terminate.

3. This stipulation is not intended to and shall not be a waiver of the rights of either party hereto, nor shall it operate in prejudice of the rights of either party.

Dated and signed at Santa Fe, New Mexico, this 26th day of February, 1924.

C. J. Roberts, Attorney for Plaintiff, Milton J. Helmick, Attorney General, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed April 30, 1924

This cause coming on for final hearing on bill, answer, evidence and stipulation and agreements of counsel in open court, counsel for the respective parties were heard and the matter was duly considered, and the Court finding that the value of the business done by the plaintiff in New Mexico and of the right to continue to do business therein exceeds the sum of five thousand dollars and that the matter in controversy exceeds, exclusive of interest and cost, the sum of three thousand dollars, and that the defendants intend to suspend the right and the certificate of authority of the plaintiff to do business in New Mexico for the sole reason that the plaintiff has made payments to its agents in states other than New Mexico in connection with the procurement of business made, written and placed by the plaintiff in New Mexico, but the Court being of the [fol. 27] opinion that such payments are, by virtue of Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the New Mexico Laws of 1921, unlawful, and that said Section 2820 in so far as it applies to and makes unlawful such payments and authorizes the suspension of the plaintiff's certificate of authority to do business in New Mexico, because of any violation of said section by such payments is valid, constitutional legislation of the State of New Mexico binding on the plaintiff,

Now, therefore, it is by the Court this 30th day of April, 1924, ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed with costs to defendants and the temporary restraining order entered herein on the 9th day of January, 1924, and continued in full force and effect until the final hearing herein by stipulation and agreement between the parties herein approved by the Court on the 9th day of January, 1924, be and it hereby is dissolved.

Colin Neblett, United States District Judge.

In United States District Court

Assignment of Errors and Prayer for Reversal—Filed April 30, 1924

Now comes Fidelity and Deposit Company of Maryland, a body corporate, plaintiff and appellant, and for its assignment of errors shows:

1. That the Court erred in not holding that Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the Laws of 1921, approved March 14, 1921, in so far as it prohibits or declares unlawful the payment by the plaintiff of compensation to its officers, employees or agents not residents of the State of New Mexico [fol. 28] for services rendered wholly outside of the State of New Mexico in connection with the procurement of business made, written and placed by the plaintiff in the State of New Mexico and in so far as it undertakes to empower and authorize the defendants or any of them to suspend the plaintiff's certificate of authority to do business in the State of New Mexico because of such payments to such non-residents of the State of New Mexico, would deprive the plaintiff of its liberty and property without due process of law and would deny to the plaintiff the equal protection of the laws and is therefore contrary to the Fourteenth Amendment of the Constitution of the United States and is therefore null and void.

2. That the Court erred in holding that the aforesaid Section 2820, amended as aforesaid, in so far as it applies to and makes unlawful payments by the plaintiff to its agents in states other than New Mexico, not residents of New Mexico, for services rendered wholly outside of New Mexico in connection with the procurement of business made, written and placed by the plaintiff in New Mexico and authorizes the suspension of the plaintiff's certificate of authority to do business in New Mexico because of any violation of said Section by such payments, is valid, constitutional legislation of the State of New Mexico binding on the plaintiff.

3. That the court erred in not perpetually restraining and enjoining the defendants and their respective successors in office, deputies, clerks, and attorneys and all persons acting under their authority from suspending or attempting to suspend the plaintiff's certificate of authority to do business in the State of New Mexico or from taking any further steps to that end and from refusing to renew the plaintiff's said certificate at the expiration thereof upon compliance by the plaintiff with all the requirements of the laws of the State of New Mexico relating to the renewal of such certificates, except the provisions of the aforesaid Section 2820, amended as aforesaid, in so far [fol. 29] as they are unconstitutional and void, and except also the provisions of Section 2815 of the New Mexico Code of 1915 in so far as said provisions may purport to require as part of the conditions of the plaintiff's right and authority to transact business in the State of New Mexico the acceptance of said unconstitutional and void provisions of said Section 2820 as so amended.

4. That the Court erred in dismissing the bill of complaint.

Wherefore the said plaintiff and appellant prays that the final decree made and entered herein on April — 1924, be reversed and that the Court may be directed to enter a decree in accordance with the prayers of the bill.

C. J. Roberts, Solicitor for Fidelity and Deposit Company of Maryland, Plaintiff and Appellant.

In United States District Court

Petition for Appeal and Allowance of Appeal—Filed April, 30, 1924

The above named plaintiff, Fidelity and Deposit Company of Maryland, a body corporate, conceiving itself aggrieved by the final decree made and entered on April 30, 1924, in the above entitled cause, doth hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and the plaintiff prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated at Santa Fe, New Mexico, April 30, 1924.

C. J. Roberts, Solicitor for Fidelity and Deposit Company of Maryland, Plaintiff and Appellant.

And now, to wit, on April 30, 1924, it is ordered that the appeal [fols. 30–32] be allowed as prayed upon the filing of a bond in the sum of five hundred dollars ($500.00) with good and sufficient security, said appeal to operate as a supersedeas of the final decree of April 30, 1924, and United States Fidelity and Guaranty Company is accepted as surety on said bond and said bond is now approved.

Colin Neblett, United States District Judge.

Bond on Appeal for $500—Approved and filed April 30, 1924; omitted in printing

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[fol. 33] , In United States District Court

Order Restoring and Modifying Temporary Restraining omitted in printing

The plaintiff in open court this 30th day of April, 1924, having prayed an appeal to the Supreme Court of the United States from the final decree entered herein on the 30th day of April, 1924, dismissing the bill of complaint and dissolving the temporary restraining order entered herein on the 9th day of January, 1924, and con-

tinued in full force and effect until the final hearing herein by stipulation and agreement between the parties, approved by the Court on the 9th day of January, 1924, and having presented and filed its assignment of errors and prayer for reversal and its bond in the sum of five hundred dollars ($500) with good and sufficient security, approved by the Court, and said appeal having this day been allowed by the District Judge who decided the cause and entered said final decree, it is this 30th day of April, 1924, ordered that the temporary restraining order entered herein on the 9th day of January, 1924, continued in full force and effect until the final hearing herein by stipulation and argreement between the parties approved by the Court on the 9th day of January, 1924, and dissolved by the final decree entered herein on the 30th day of April, 1924, be and said temporary restraining order hereby is restored and modified, as hereinafter set forth, during the pendency of the appeal from said final decree to the Supreme Court of the United States upon the terms hereinafter set forth, and it is adjudged and ordered that, during the pendency of said appeal, the defendants, J. M. Luna, Chairman, and Hugh H. Williams and Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of New Mexico, and each of them and their respective successors in office, deputies, clerks and attorneys [fol. 34] and all persons acting under their authority, be and they and each of them hereby are restrained and enjoined from suspending or attempting to suspend the plaintiff's certificate of authority to do business in the State of New Mexico or from any further steps to that end and from refusing to renew from time to time the plaintiff's said certificate at the expiration thereof upon compliance by the plaintiff with all the requirements of the laws of the State of New Mexico relating to the renewal of such certificates, except the provisions of Section 2820 (as amended) of the New Mexico Code of 1915 in so far as they prohibit or declare unlawful the payment by the plaintiff of compensation to its officers, employees or agents not residents of the State of New Mexico for services rendered wholly outside of the State of New Mexico in connection with the procurement of business made, written and placed by the plaintiff in the State of New Mexico and except also the provisions of Section 2815 of said Code in so far as said provisions may purport to require, as a part of the conditions of the plaintiff's right and authority to transact business in the State of New Mexico, the acceptance of the aforesaid provisions of said Section 2820 (as amended). This order shall become effective upon the giving of security by the plaintiff by filing a bond in the sum of five thousand dollars ($5,000) conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Colin Neblett, United States District Judge.

[fols. 35-37] BOND REQUIRED BY ORDER RESTRAINING AND MODIFYING TEMPORARY RESTRAINING ORDER FOR $5,000—Filed April 30, 1924; omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EVIDENCE—Filed May 17, 1924

It is hereby stipulated and agreed by and between the parties hereto, the plaintiff by C. J. Roberts, its attorney, and the defendants by Milton J. Helmick, Attorney-General, their attorney, that the evidence in this case for the purpose of this appeal is as follows, to-wit:

IN UNITED STATES DISTRICT COURT

COLLOQUY BETWEEN COURT AND COUNSEL

C. J. Roberts: In the pleadings in this case there is a denial of the fact that we have written or placed in the State of New Mexico, insurance upon which premiums have been paid to the Company of more than Five Thousand Dollars ($5,000).

It is stipulated and agreed between the Attorney General and myself that the affidavit of Charles R. Miller, Vice President of the Petitioner, shall be received as evidence as to the revenue derived from the business done in New Mexico for the year 1923, and I now offer this affidavit in evidence, and ask that it be marked 'Petitioner's Exhibit A,' which shows the total revenue derived from business in New Mexico for the year 1923 of $14,844.13.

M. J. Helmick: There is no objection.

The Court: It will be received.

C. J. Roberts: There is another denial in the answer, the first sentence of Paragraph Six of Petitioner's Bill of Complaint, and it is stipulated and agreed between the parties hereto that no bond or undertaking has been written or placed in the State of New Mexico by the Petitioner Company unless the same purports on its face to have been made, written or placed through Petitioner's duly and regularly appointed and authorized agent or agents, residents of this State.

Petitioner now offers in evidence a certified copy of the record and [fol. 39] proceedings had before the State Corporation Commission of the State of New Mexico, in the Matter of the suspension of the Fidelity and Deposit Company of Maryland, which proceedings were had on the 8th day of January, 1924, and ask to have the same marked as Petitioner's Exhibit 'B.'

M. J. Helmick: No objection.

The Court: It will be admitted.

C. J. Roberts: Petitioner rests.

M. J. Helmick: We offer in evidence the Acceptance of Laws, of the State of New Mexico, by Petitioner, dated January 28, 1911, and January 26, 1924, filed with the Insurance Department, Bank Examiner's office, of the State of New Mexico, the same being the original records from his office.

C. J. Roberts: Petitioner objects to the introduction of this in evidence, because the Surety Company was required to sign such a

statement by compulsion in order to be authorized to continue its business in the State of New Mexico, and if the statute be unconstitutional as construed and applied by the officers executing the same, petitioner would in no wise be bound by the written acceptance.

The Court: Objection overruled. It will be admitted.

C. J. Roberts: Exception to the ruling of the Court.

M. J. Helmick: The defendants having no further evidence to offer rests, and re-affirms and renews the motions and objections in their Answer contained.

C. J. Roberts: Petitioner having by its evidence established that the matter in controversy exceeds, exclusive of interest and costs, the sum of Five Thousand Dollars, by proving that its revenue from business transacted in New Mexico annually exceeds said sum, and [fol. 40] having proved every material allegation in the Bill by the certified copy of the proceedings had before the State Corporation Commission upon which the action of cancellation by said Commission was to be taken, the Petitioner now moves the Court for Judgment in its favor as prayed in its Bill of Complaint.

After argument by counsel the court rendered its decision in this matter, which is embodied in a decree filed of record in this case.

PETITIONER'S EXHIBIT A

N. V. Belles

1034, Equity

STATE OF MARYLAND,
City of Baltimore, ss:

I hereby certify that on this 1st day of March, 1924, before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared Charles R. Miller, The Vice-President of the Fidelity and Deposit Company of Maryland, the complainant in the case entitled "Fidelity and Deposit Company of Maryland, a body corporate, vs. J. M. Luna, Chairman, and Hugh H. Williams and Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of New Mexico," in the United States District Court for the District of New Mexico, and made oath in due form of law that the receipts of the Fidelity and Deposit Company Maryland in the State of New Mexico from its general bonding and surety business for the year 1923 were Fourteen Thousand, Eight Hundred, Forty-four Dollars and Thirteen Cents ($14,844.13), and more than half of this business were receipts from business actually developed in the State of New Mexico.

(Sgd.) Chas. R. Miller, the Vice-President Fidelity and Deposit Company of Maryland.

Sworn to this 1st day of March, 1924. (Sgd.) E. Bayley Bates, Notary Public. My commission expires May 5th, 1924. (Seal.)

[fol. 41] STATE OF NEW MEXICO

(Seal State Corporation Commission of New Mexico)

Certificate of Comparison

UNITED STATES OF AMERICA,
State of New Mexico, ss:

It is hereby certified that the annexed is a full, true and complete transcript of the proceedings had before the State Corporation Commission in the matter of the suspension of the Fidelity and Deposit Company of Maryland, with the endorsements thereon, as same appears on file and of record in the office of the State Corporation Commission.

In testimony whereof the State Corporation Commission of the State of New Mexico has caused this certificate to be signed by its Chairman and the seal of said Commission, to be affixed at the City of Santa Fe, on this 20th day of March A. D. 1924.

(Sgd.) Hugh H. Williams, Chairman.

Attest: (Sgd.) A. J. Morrison, Clerk. (Seal.)

[fol. 42] PETITIONER'S EXHIBIT B

N. V. Belles

BEFORE THE STATE CORPORATION COMMISSION

In the Matter of the Suspension of the Fidelity & Deposit Company of Maryland

1034, Equity

DEPUTY FOR INSURANCE, INSURANCE DEPARTMENT, STATE OF NEW MEXICO, Complainant,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant

Santa Fe, New Mexico,
January 8, 1924.—10:00 o'clock a. m.

Appearances: Milton J. Helmick, Attorney General, representing the State Insurance Department, Walter B. Wagner, Deputy for Insurance, Hugh H. Williams, Chairman Corporation Commission, Bonifacio Montoya, Commisioner, appearing for Complainant. C. J. Roberts, appearing for defendant.

Proceedings

The Insurance Department of the State of New Mexico has requested that the right of the Fidelity and Deposit Company of Maryland to transact business in the State of New Mexico be suspended for the period of one year from the 19th day of November, 1923, for an alleged violation of the provisions of Chapter 195 of the Session Laws of 1921, and this investigation is called for the purpose of determining what, if any, action shall be taken in the premises.

[fol. 43] Chairman Williams: Who represents the Fidelity and Deposit Company of Maryland?

C. J. Roberts: C. J. Roberts.

Chairman Williams: The Fidelity and Deposit Company of Maryland is cited to appear in response to a letter dated November 14, 1923, which letter reads as follows, to-wit:

"Santa Fe, November 14, 1923.

The State Corporation Commission, Santa Fe, New Mexico.

GENTLEMEN: This Department requests that the right of the Fidelity & Deposit Company of Maryland to transact business in this State, be suspended for the period of one year from the 19th day of November, 1923, for violation of the provisions of Chapter 195 of the Session Laws of 1921.

Your very truly, (Signed) Walter B. Wagner, Deputy for Insurance."

And the Fidelity and Deposit Company of Maryland now appearing in response to such notice, with its returning answer, which is as follows, to-wit:

"Baltimore, Maryland, December 13th, 1923.

State Corporation Commission, Santa Fe, New Mexico.

GENTLEMEN: The State Bank Examiner, through the deputy for insurance, has requested your Commission to suspend the right of the Fidelity and Deposit Company of Maryland to transact business in New Mexico for the period of one year. In order that we might have time in which to appear before you and show cause why that request should not be granted, the request was amended so that the suspension, if any, is to commence on December 20, 1923.

[fol. 44] In response to this request and as cause why the request should not be granted, we respectfully show:

In the case of the particular Hamer contract concerning which correspondence has been had with the office of the State Bank Examiner, we have not paid or promised to pay any fee, brokerage or other emolument to any person not a resident of the State of New Mexico. Nor have we in any case made, written or placed, or caused to be made, written or placed in New Mexico any insurance contract unless the same has been made, written or placed through our agents, residents of New Mexico.

In many cases, however, services of value have been rendered to us by our agents or officers or employees in other states in connection with the procurement of such business made, written and placed in New Mexico. For instance, our agents or branch officers in other states frequently receive applications from residents of such other states for bonds guaranteeing the fidelity of New Mexico employees of such applicants. In such cases our agents or branch offices in other states transmit such business to New Mexico and the bonds are executed by the New Mexico employees of the applicants and are made, written and placed by us in New Mexico through our agents, residents of New Mexico. In such cases, however, the services rendered us by our agents or branch offices in other states are of value to us and necessarily must be and are paid for. In the case of branch offices such services are part of the regular services for which our branch office officers and employees receive regular salaries or compensation. In the case of agencies such services are paid for by commissions on such basis as is agreed upon outside of New Mexico, between our agents and ourselves.

[fol. 45] We are advised that by virtue of the Fourteenth Amendment of the Constitution of the United States the State of New Mexico has no right whatsoever to control, regulate or prohibit our contracts, agreements or arrangements, made outside of New Mexico, concerning compensation of our officers, employees or agents who do not reside in New Mexico for services rendered wholly outside of the State of New Mexico. We are therefore advised that if Section 2820 of the New Mexico Code of 1915 (as amended in 1921) be construed (as the State Bank Examiner construes it) as pro-hibiting or declaring unlawful the payment by us of compensation to our officers, employees and agents outside of New Mexico under the circumstances and for the services mentioned, then this section, as so construed and applied, is contrary to the Fourteenth Amendment of the Constitution of the United States and is therefore null and void.

Very truly yours, Fidelity and Deposit Company of Maryland, per (Signed) Chas. R. Miller, Vice President."

And the State Corporation Commission having now heard the answer of the Company, announces that it will, upon the admissions contained in the answer, in due course, enter an Order suspending the Company, in accordance with the request made by the Deputy for Insurance, of the Insurance Department, State of New Mexico, for the period of one year.

Mr. Williams: No further matters coming up at this time, we will consider the hearing closed.

(Whereupon, at 10:45 A. M. January 8, 1924, the *the* hearing [fol. 46] of the above entitled matter was closed.)

State Corporation Commission of New Mexico, by (Sgd.) Hugh H. Williams, Chairman.

Attest: (Sgd.) A. J. Morrison, Clerk. (Seal.)

DEFENDANT'S EXHIBIT 1

N. V. Belles

Insurance Department. Received Jan. 29, 1924, Santa Fe.

1034, Equity

Acceptance of Laws

STATE OF MARYLAND,
City of Baltimore:

This is to certify that the Fidelity and Deposit Company of Maryland Insurance Company hereby accepts all of the provisions of Chapter LVIII of the Codification of 1915, entitled "An Act to Establish an Insurance Department in the State of New Mexico, and to Regulate Insurance Companies Doing Business Therein" and all Acts amendatory or additional thereto, and acknowledges that the provisions of said Act, amendments and additions constitute a part of the conditions of its right and authority to transact business in the State of New Mexico.

Fidelity and Deposit Company of Maryland, by (Sgd.) Fred S. Axtell, Vice-President.

Date: Jan. 26, 1924.

[fol. 47] DEFENDANT'S EXHIBIT 2

N. V. Belles

1034, Equity

Acceptance of Laws

STATE OF MARYLAND,
City of Baltimore:

This is to certify that the Fidelity and Deposit Company of Maryland hereby accepts all of the provisions of Chapter 5 of the Acts of the Legislative Assembly of the Territory of New Mexico, approved February 9, 1905, entitled "An Act to Establish an Insurance Department in the Territory of New Mexico and to Regulate Insurance Companies doing Business Therein," and acknowledges that the provisions of said Act constitute a part of the conditions of its right and authority to transact business in the Territory of New Mexico.

Fidelity and Deposit Company of Maryland, by (Sgd.) Chas. R. Miller, Vice-President.

Dated Balto., Md., Jany. 28, 1911.
(On back:) Filed Feby. 1, 1911.

Dated and signed at Santa Fe, New Mexico, this 17th day of May, A. D. 1924.

C. J. Roberts, Attorney for Plaintiff. Milton J. Helmick, Attorney for Defendants.

[fol. 48] IN UNITED STATES DISTRICT COURT

JUDGE'S APPROVAL OF STATEMENT OF EVIDENCE

I, Colin Neblett, Judge of the United States District Court for the District of New Mexico, do hereby approve the foregoing as the evidence in this case for the purpose of appeal herein, pursuant to stipulation of counsel.

Dated and signed at Santa Fe, New Mexico, this 17th day of May, A. D. 1924.

Colin Neblett, United States District Judge.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 1, 1924

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Supreme Court of the United States, including therein the following:

1. Bill of Complaint.
2. Motion for Preliminary Injunction.
3. Stipulation waiving service of notice of application for preliminary injunction.
4. Stipulation entering appearance for defendants and waiving the issuance and service of process, and for continuance of preliminary injunction until final hearing, and approval by the Court of the same.
5. Temporary restraining order.
6. Injunction bond filed by plaintiffs.
7. Answer.
8. Reply.
9. Stipulation for renewal of certificate of plaintiff to do business [fol. 49] in New Mexico pending final determination of this case.
10. Final Decree.
11. Assignments of error and prayer for reversal.
12. Petition for appeal and allowance of appeal.
13. Appeal Bond.
14. Citation and acceptance of service.
15. Order restraining and modifying temporary restraining order pending appeal.
16. Bond required by order restraining and modifying temporary restraining order.

17. Statement of evidence.
18. This Præcipe with acceptance of service.

Dated this 1st day of May, 1924.
C. J. Roberts, Attorney for Appellant, Santa Fe, New Mexico.

Notice of filing Præcipe for record is hereby waived and acknowledgment is made that a copy of this Præcipe was served on me this 1st day of May, 1924.
Milton J. Helmick, Attorney for Defendants-Appellees.

[fol. 50] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Wm. Rose, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the above and foregoing, consisting of 49 pages, constitutes a full and perfect transcript of the record and proceedings in said cause, as shown from the files and record of my office therein, and as called for by appellant's præcipe for transcript on page 48 thereof; except the Citation on Appeal, at page one thereof, which is the original citation.

Witness my hand and the seal of said Court, at Santa Fe, in said District, on this 24th day of May, A. D. 1924.
Wm. Rose, Clerk. (Seal of the United States District Court, District of New Mexico.)

Endorsed on cover: File No. 30,401. New Mexico D. C. U. S. Term No. 436. Fidelity and Deposit Company of Maryland, appellant, vs. J. M. Luna, chairman, and Hugh H. Williams and Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, et al. Filed June 7th, 1924. File No. 30,401.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 88.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

APPELLANT,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.,

APPELLEES.

Appeal from the District Court of the United States for the District of New Mexico.

BRIEF FOR APPELLANT.

No opinion was delivered in the court below in this case.

This case presents the following constitutional question:

Can the State of New Mexico expel from the State a foreign surety corporation for the sole reason that the corporation makes payments of commissions to its agents in other States, not residents of New Mexico, for services rendered in other States in connection with the procurement of business (i. e., contracts) made, written and placed in New Mexico in conformity with the laws of New Mexico?

The District Court answered Yes. The appellant, plaintiff below (hereafter called plaintiff), says the answer must be No, for *each* of *three* reasons:

(1) The State of New Mexico cannot (consistently with due process of law) *regulate* or prohibit *anything* done *outside New Mexico* by a foreign corporation, *e. g.*, payment of commissions or other "wages" to insurance agents outside New Mexico for services rendered outside New Mexico.

(2) The State of New Mexico cannot (consistently with due process of law) *fix*—still less *prohibit*—commissions or other "*wages*" of insurance agents *anywhere*, within New Mexico or outside New Mexico.

(3) Even if the State of New Mexico possessed *both* of these powers which it *does not* possess, it could not (without denying the plaintiff the equal protection of the laws) *exercise* these powers in such a way as (*a*) to *prohibit* only payment of commissions to agents in other states for lawful services rendered in other states *by them*, or (*b*) to *require* payment of commissions to agents in New Mexico for services *not rendered by them*.

JURISDICTION.

(A). The decree from which the plaintiff appeals was filed April 30, 1924. (R. 15.)

(B). "This is an appeal, under Section 238 of the Judicial Code," [as it existed before the Act of February 13, 1925], "from a final decree of the federal court for" New Mexico "dismissing a bill brought to enjoin the enforcement of" Section 2820 of the New Mexico Code of 1915 as amended by Chapter 195 of the

Laws of 1921. (*Buck vs. Kuykendall*, 267 U. S. 307, 312.) Section 2820 as so amended declares it unlawful "for any insurance company authorized to do business in New Mexico * * * to pay or promise to pay * * * any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico for the obtaining * * * of any policy or policies of insurance covering risks in New Mexico." The plaintiff, a Maryland surety company, a foreign insurance company authorized to do business in New Mexico, pays commissions to its agents in other states for services rendered to plaintiff in other states in connection with the procurement of business made, written and placed in New Mexico. The defendant Bank Examiner asserted that such payments by plaintiff constituted a violation of Section 2820, and requested the other defendants, the State Corporation Commission, to suspend plaintiff's right to do business in New Mexico. The Commission determined to grant this request and to suspend for one year plaintiff's certificate of authority. The defendants' *sole reason* for this proposed action was the fact that plaintiff made these payments to its agents in other states.

In the lower court plaintiff specifically claimed that Section 2820, as construed and applied by the defendants, would deprive the plaintiff of its property without due process of law and would deny it the equal protection of the laws, and was, therefore, null and void by virtue of the Fourteenth Amendment of the Constitution of the United States (R. 7). The lower court in its final decree specifically ruled (*a*) that payments by plaintiff to its agents in other states in connection with the procurement of business made, written and placed by plaintiff in New Mexico were, by

virtue of Section 2820 as amended, unlawful, and (*b*) that Section 2820, in so far as it applied to and made unlawful such payments, is valid, constitutional legislation. (R. 15.)

(C). The jurisdiction of the lower court rests on the following provision of Section 24 of the Judicial Code:

> "Sec. 24. The District Courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * *." [36 Stat. L. 1091.]

The jurisdiction of this Court is involved under the following provision of Section 238 of the Judicial Code [as it existed before the Act of February 13, 1925]:

> "Sec. 238. Appeals and writs of error may be taken from the district courts * * *, direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States; * * * and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." [36 Stat. L. 1157 as amended 38 Stat. L 804.]

(D). The defendants' answer suggests that the bill "does not question the validity or constitutionality of any law of the State of New Mexico, but, on the contrary * * * purports and pretends to question a mere construction of certain statutes of the State of New Mexico and the administrative acts of officers of the State of New Mexico" (R. 11), and that "plaintiff,

by its bill seeks to attack the administrative acts of these defendants merely and not the validity of the said statutes * * * and that, therefore, plaintiff having specifically neglected to attack the validity of the statutes has attacked nothing * * *" (R. 13). The defendants, however, assert in the same sentence "that the acts of these defendants are necessarily in full conformity with the said statutes" (R. 13), and also expressly deny that they have "placed any peculiar or individual construction upon" Section 2820 in performing the acts complained of in the bill, but on the contrary assert "that the plain, ordinary and fair construction of the said statute, applied to the admitted acts of the plaintiff, necessarily establishes that plaintiff has been guilty of a violation of the said Act." (R. 12.)

The bill specifically states the defendants' construction and application of Section 2820 and denies the constitutionality of Section 2820 as so construed and applied by the defendants (R. 5, 6, 7). The defendants do not deny the *fact* that they so construe and apply the statute or the *correctness* of their construction. On the contrary, they assert the correctness of their construction. No other construction was suggested in the lower court. The lower court in its final decree expressly sustained the defendants' construction of the statute (which had not been questioned) and the constitutionality of the statute as so construed (which had been directly denied by the plaintiff). (R. 15.) The question of the constitutionality of the statute was thus squarely presented in the lower court, and is likewise presented in this Court.

The jurisdiction of the lower court and of this Court, however, does not depend upon whether the defendants construed correctly or misconstrued the

statute in question. The defendants are officers of the State of New Mexico. They purport to act under the statute in question; in so acting they threaten to deprive the plaintiff of property without due process of law in violation of the Fourteenth Amendment. So far as the jurisdiction of the lower court and of this Court to redress the threatened wrong is concerned, such action of the defendants is to be regarded as the action of the State. Under such circumstances inquiry whether the State has authorized the wrong, *i. e.*, whether the defendants have correctly construed the state statute, is irrelevant. (*Home Tel. & Tel. Co. vs. Los Angeles*, 227 U. S. 278, 287-289, 294; *Raymond vs. Chicago Tr. Co.*, 207 U. S. 20, 35-37; *Ex pare Young*, 209 U. S. 123, 155-156; *Cuyahoga Power Co. vs. Akron*, 240 U. S. 462, 464.)

The plaintiff cannot attack the constitutionality of a statute *in vacuo*. The plaintiff must, as it does, aver and prove that the statute, *as construed and applied by the defendants against whom relief is sought*, violates plaintiff's constitutional rights. (*Meyer vs. Nebraska*, 262 U. S. 390, 399.)

(E). In this case the jurisdiction of the lower court and of this Court rests on the same ground as in the recent cases in which this Court has affirmed decrees of District Courts enjoining the enforcement of unconstitutional anti-removal statutes by threatened revocation of the license of a foreign corporation. (*Terral vs. Burke Constr. Co.*, 257 U. S. 529, 530; *Herndon vs. Chi., Rock Island and Pac. Ry. Co.*, 218 U. S. 135; *Harrison vs. St. L. and San Francisco R. R.*, 232 U. S. 318; *Wisconsin vs. Phila. & Reading Coal Co.*, 241 U. S. 329.)

In *Adams vs. Tanner*, 244 U. S. 590, in which this Court, on appeal from the District Court, reversed a

decree dismissing a bill for injunction against enforcement of the Washington Employment Agency Law, this Court said:

> "Considering the doctrine affirmed in *Truax vs. Raich*, 239 U. S. 33, and cases there cited, the record presents no serious question in respect of jurisdiction."
>
> 244 U. S. 592.

In *Terrace vs. Thompson*, 263 U. S. 197, on appeal from a decree of the District Court dismissing a bill for injunction against enforcement of the Washington Alien Land Law, this Court said:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Cavanaugh vs. Looney*, 248 U. S. 453, 456; *Truax vs. Raich*, 239 U. S. 33, 37, 38. See also *Ex parte Young*, 209 U. S. 123, 155, 162; *Adams vs. Tanner*, 244 U. S. 590, 592; *Greene vs. Louisville & Interurban R. R. Co.*, Id., 499, 506; *Home Telephone & Telegraph Co. vs. Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co. vs. Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co. vs. Andrews*, 216 U. S. 165; *Dobbins vs. Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co. vs. Los Angeles*, 189 U. S. 207, 217."
>
> 263 U. S. 214-215.

(F). *Amount in Controversy.*

The bill in this case, which was sworn to (R. 8), avers generally that "the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000)" (R. 1), and more specifically that "the present value of the business done by your orator in the State of New Mexico or of the right to continue to do business in the State of New Mexico in compliance with the laws of New Mexico exceeds the sum of five thousand dollars ($5,000)" (R. 3, 4). The defendants in their answer say "they are without information sufficient to form a belief as to whether or not the matter in controversy exceeds * * * the sum of $3,000, and therefore * * * on information and belief deny" that averment (R. 11) and "they have no information sufficient to form a belief as to the present value of business done by plaintiff in the State of New Mexico or of the right to continue business in the State of New Mexico or whether said right exceeds the sum of $5,000 and consequently defendants deny such allegations on information and belief" (R. 12). These denials on information and belief were not followed up by any evidence.

By stipulation and agreement between counsel in open court at the hearing there was received as evidence without objection (R. 19) an affidavit of Charles R. Miller, Vice-President of the plaintiff, "that the receipts of the Fidelity and Deposit Company of Maryland in the State of New Mexico from its general bonding and surety business for the year 1923 were fourteen thousand, eight hundred and forty-four dollars and thirteen cents ($14,844.13), and more than half of this business were receipts from business actually developed in the State of New Mexico." (R. 20.)

The court below, in its final decree, expressly found "that the value of the business done by the plaintiff in New Mexico and of the right to continue to do business therein exceeds the sum of five thousand dollars, and that the matter in controversy exceeds, exclusive of interest and cost, the sum of three thousand dollars." (R. 15.)

> "The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & Missouri R. R. Co. vs. Ward*, 2 Black, 485; *Texas & Pacific Ry. Co. vs. Kuteman*, 54 Fed. 547, 552; *Nashville, C. & St. L. Ry. Co. vs. McConnell*, 82 Fed. 65, 73; *Scott vs. Donald*, 165 U. S. 107, 114; *City of Hutchinson vs. Beckham*, 118 Fed. 399, 402; *Evenson vs. Spaulding*, 150 Fed. 517, 520; *Hunt vs. New York Cotton Exchange*, 205 U. S. 322, 336."
>
> *Packard vs. Banton*, 264 U. S. 140, 142.

> "Plaintiff seeks to be relieved not only from constructing the side track but also from maintaining it in suitable condition for use, and from the cost and expense of using and operating it for the movement of cars to and from the warehouse. The value of all these is involved. *Glenwood Light & Water Co. vs. Mutual Light Co.*, 239 U. S. 121, 125; *Berryman vs. Board of Trustees of Whitman College*, 222 U. S. 334; *Bitterman vs. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 225; *Hunt vs. New York Cotton Exchange*, 205 U. S. 322, 336. It is shown that the permanent annual burden on account of interest on such cost, depreciation, maintenance and operating expenses of such side track will exceed $200, and this capitalized at a reasonable rate exceeds $3,000. Laying aside other considerations bearing upon the matter, the amount is shown to be sufficient."
>
> *W. & A. R. R. Co. vs. R. R. Comm.*, 261 U. S. 264, 267.

In this case plaintiff's New Mexico receipts for the last year before the hearing were almost five times

the sum of $3,000. If the net value of this business to the plaintiff itself were no more than the direct value of the business to the State of New Mexico, viz., the two per cent. tax paid by the plaintiff to the State of New Mexico (Laws of 1921, Chapter 194, Section 2; Laws of 1925, Chapter 135, Section 27), the annual value would exceed $296, "and this capitalized at a reasonable rate exceeds $3,000." Besides such direct value, the right to do business in New Mexico has a substantial, though not easily measurable, value as part of the good will of the very business involved in this case, viz., business "originating" in other states with regular customers who happen to need bonds in New Mexico.

(G). *New Mexico Act of 1925.*

(*a*) While this case was pending on appeal in this Court, Chapter 135 of the New Mexico Laws of 1925, entitled "An Act relating to insurance and to codify the Insurance Laws of the State of New Mexico" was approved on March 20, 1925, effective immediately (Sec. 77). This Act of 1925 is a codification of the New Mexico Insurance Laws. Section 76 of the Act of 1925 provides that "all laws or parts of laws relating to the subject of insurance now existing in the State of New Mexico are hereby repealed," with exceptions not now material. Thus during the pendency of this case in this Court not only Section 2820 (as amended) of the New Mexico Code of 1915 but also every other New Mexico statutory provision quoted or referred to in the bill have been in form expressly repealed—but in substance re-enacted without any change (except as to one party defendant) material in this case.

In paragraphs 3 and 5 of the bill (R. 1-3, 4) are set out in words or in substance certain New Mexico constitutional provisions, which have not since been changed, and statutory provisions, which have been

thus repealed and substantially re-enacted by the Act of 1925. In Appendix A of this brief [*infra*, 99] paragraphs 3 and 5 of the bill are set out in full; in a parallel column are set out in words or in substance the respective provisions of the Act of 1925 which supplant the prior statutory provisions cited in the bill. Section 2820 (as amended) of the Code of 1915 is supplanted by Section 68 [quoted in full in Appendix A, *infra*, 106-108] of the Act of 1925.

(*b*) Section 68 of the Act of 1925 contains four provisos, which in certain particulars narrow its scope and to this extent differentiate it from the supplanted Section 2820. None of these four provisos, however, are material in this case. In other respects Section 68 is broader in scope than Section 2820. The unconstitutional basic requirement is, though verbally different, essentially the same in Section 2820 as in Section 2820, viz.:

Section 2820. * * * It shall be unlawful for any insurance company authorized to do business in New Mexico * * * to pay * * * any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico for the obtaining * * * of any policy or policies of insurance covering risks in New Mexico. * * *''	*Section* 68. No company licensed to transact an insurance business in the State of New Mexico shall issue any contract of insurance or indemnity assuming liability on any risk or hazard in the State of New Mexico unless * * * the full commission [is] retained thereon by one of its duly appointed agents licensed in the State of New Mexico. * * *''

In a word, Section 2820 provides that the company shall *not* pay any emolument to a non-resident; Sec-

tion 68 provides that "*the full* commission" *shall* be paid to an agent licensed in New Mexico, *i. e.*, a resident agent, a "person in the State of New Mexico" (Section 33), licensed "to act as agent for" an "insurance company or * * * to transact * * * insurance business in the State of New Mexico" (Section 34), "appointed by an insurance company licensed to transact business in this State to act as its representative in any given locality" (Section 38). The only provision for licensing non-residents is the provision in Section 27 [Appendix A, *infra*, 101] for licenses to "non-resident brokers." "A non-resident broker shall be defined as a person, partnership or corporation maintaining his bona fide continuous residence and chief place of business within the continental limits of the United States, but not within the State of New Mexico, and engaged in the business of insurance outside of the State of New Mexico, and in the employ of any person, partnership or corporation desiring to purchase any form of insurance from an agent of any insurance company or companies licensed to transact business in the State of New Mexico, and who receives his remuneration in whole or in part from the agent of the insurance company from whom the insurance is purchased." (Section 40.)

The only possible reason or inducement for taking out a non-resident broker's license in New Mexico (and paying therefor $20, just ten times the fee for a resident agent's license [Sec. 27, Appendix A, *infra*, 101]), is to get the benefit of the first proviso in Section 68. That proviso permits a "licensed non-resident broker," who "performs service" by procuring outside of New Mexico business to be written in New Mexico, to receive *part* of the commission paid for *procuring* and writing the business; without the proviso Section

68 would require all the commission to be paid to and retained by the New Mexico resident agent who writes but *does not procure* the business. Even this tenfold costly permission to divide commissions between New Mexico resident agents, who do *not* earn them by procuring business, with non-resident brokers, who do procure the business, is too narrow to be applied to the facts of this case. The definition of a "non-resident broker" (Section 40) includes only *brokers, i. e.,* persons "in the employ of" the insured, and not *agents* in the employ of the company.

Nor is the second proviso in Section 68 "that any licensed agent of any insurance company may pay to any other licensed agent of any insurance company for services rendered any part of any commission received by him from any insurance company he is licensed in New Mexico to represent" applicable to the facts of this case. In this proviso "any other licensed agent" means agent licensed in New Mexico, not a non-resident agent licensed in another state. In short, "licensed agent" in the second proviso and "licensed non-resident broker" in the first proviso mean the same thing, viz., licensed in New Mexico. Otherwise the provisions in Section 27 [Appendix A, *infra*, 101] for licensing non-resident brokers, and in Section 68 [Appendix A, *infra*, 108] for suspending such licenses for violation of Section 68, would be practically meaningless, since there would then be no reason or inducement for a non-resident broker licensed in his own state to take out a New Mexico license.

(*c*) The formal repeal—and substantial re-enactment—of Section 2820 and the rest of the insurance laws of New Mexico by the Act of 1925 while this case was pending on appeal in this Court does not make

the case moot or impair the jurisdiction of this Court to decide the case. Notwithstanding this repeal and re-enactment, the case must be decided on its merits for two reasons:

(1) The question of the constitutionality of Section 2820, as amended and in force when the bill was filed, must be decided, because the repeal of Section 2820 by the Act of 1925 would not exempt the plaintiff from punishment by suspension of its certificate of authority for violation of Section 2820 before the repeal. (*Groesbeck vs. Duluth S. S. & A. Ry. Co.*, 250 U. S. 607, 609.)

(2) If Section 68 of the Act of 1925, as applied to this case, were different in effect from Section 2820 then the question of the constitutionality of Section 68 would have to be decided in this case, because the plaintiff's business is a continuing business, and the relief sought by injunction is the permanent right to do business without suspension or revocation of its license on account of payments to non-residents either before March 20, 1925, while Section 2820 was in force, or since March 20, 1925, while Section 68 is in force.

1. (*i*) Sections 33 and 34 of Article IV of the New Mexico Constitution provide:

> "*Sec.* 33. No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this State by reason of the subsequent repeal of such law."
>
> "*Sec.* 34. No act of the Legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

This case is within the letter and spirit of Section 33. Sections 33 and 34 are remedial provisions and should be liberally construed in aid of their obvious

purpose to prevent unintended and undeserved amnesties that might result through the technical operation of repeals of statutes at common law. Within the meaning of Section 33 suspension of plaintiff's license would be "punishment" and violation of Section 2820 would be an "offense." (Cf. *Ex Parte Grossman*, 267 U. S. 87.)

(ii) Even in the absence of Section 33 of Article IV of the New Mexico Constitution, Section 2820, as amended and in force before March 20, 1925, would not be abrogated by express repeal and simultaneous re-enactment in Section 68 of the Act of 1925. When a statute is in terms repealed and simultaneously re-enacted with changes, so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption. So much as it omitted is repealed, and only a substantial change in other portions or any matter which is entirely new is operative as new legislation.

Steamship Company vs. Joliffe, 2 Wall. 450, 458-459;

Bear Lake Irrigation Co. vs. Garland, 164 U. S. 1, 11-13;

Campbell vs. California, 200 U. S. 87, 92-93;

Great Northern Ry. Co. vs. United States, 155 Fed. 945, 948-955, (Circuit Court of Appeals, Eighth Circuit. Opinion by Mr. JUSTICE [then Circuit Judge] VAN DEVANTER exhaustively reviewing the authorities. Affirmed on somewhat narrower grounds, 208 U. S. 452).

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It oper-

> ates without interruption where the re-enactment takes effect at the same time. * * * Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-eactment of the law on which they respectively depend."
>
> *Sutherland* on *Statutory Construction* (2d Edition), Sec. 238, quoted in *Great Northern Ry. Co. vs. United States*, 155 Fed. 948.

2. The plaintiff's business is a continuing business. The bill expressly alleges that in many cases in the course of the conduct of this business services of value "have been *and are* rendered" to the plaintiff by its agents in other states in connection with the procurement of business made, written and placed in New Mexico. Plaintiff's agents in other states "frequently have received *and do receive*" applications from residents of such other states for bonds guaranteeing the fidelity of New Mexico employees. In such cases the services rendered plaintiff by its agents in other states are of value and "necessarily must be, have been *and are* paid for." Such services "*are* paid for" by commissions on such basis as is agreed upon outside of New Mexico between plaintiff and its agents. (R. 4-5.)

The relief sought by the plaintiff by injunction is, therefore, the permanent right to continue this course of business without suspension or revocation of its license on account of payments to non-residents either in the past before the repeal of Section 2820 or in the future. If necessary, therefore, *i. e.*, if Section 68 of the Act of 1925 as applied to the facts of this case were different in effect from Section 2820, the constitutionality of Section 68—as well as the constitutionality of Section 2820—would have to be decided in this case.

In *Clark Distilling Co. vs. West'n Md. Ry. Co.*, 242 U. S. 311, on appeals from decrees of the District Court dismissing bills to enjoin enforcement of a state statute alleged to be unconstitutional, this Court, referring to an amendment of the statute in question while the cases were pending in this Court, said:

> "As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution."
> 242 U. S. 319.

In *Texas Co. vs. Brown*, 258 U. S. 466, involving a similar situation, this Court said:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, since the case involves only relief by injunction, and this operates wholly *in futuro*. *Duplex Printing Press Co. vs. Deering*, 264 U. S. 443, 464."
> 258 U. S. 474.

The only effect therefore (except as to one party defendant) of the repeal and substantial re-enactment of Section 2820 upon this case is that this case now presents for decision *both* (*a*) the question of the constitutionality of Section 2820 and also (*b*) (if there be any difference as applied to this case between Section 2820 and Section 68) the question of the constitutionality of Section 68. Since Section 2820 and Section 68 as applied to this case are substantially the same in effect, separate discussion of these two questions is unnecessary. The *two* questions are in effect *one* and the same question. The constitutionality of Section 2820 will, therefore, be discussed just as if the Act of 1925 had never been passed. Section 68 will be discussed and referred to only incidentally and illustratively in the course of the discussion of Section 2820.

(H). *Parties.*

On October 5, 1925, the plaintiff submitted, and this Court granted, a motion for substitution of two new parties in lieu of two of the parties named in the bill.

(*a*) On January 1, 1925, the term of office of the defendant Luna as a member of the State Corporation Commission expired and Luna was succeeded by Ed. C. Tafoya. The State Corporation Commission has a continuing existence. It is "a permanent commission." (New Mexico Constitution, Article XI, Section 1; Motion for Substitution, page 2.)

The substitution of Tafoya as a party defendant in lieu of Luna is manifestly proper and is not dependent upon the Act of Congress of February 13, 1925, or any other statute. (*Irwin vs. Wright*, 258 U. S. 219, 224-226, and cases there cited.)

(*b*) By the New Mexico Act of 1925 (Chapter 135) codifying the insurance laws, approved March 20, 1925, effective immediately (Sec. 77), all the powers relating to insurance matters then held by the Bank Examiner were transferred to the Corporation Commission (Sec. 3); a Department of Insurance was created *within the Corporation Commission*, "the chief officer of which shall be known as the Superintendent of Insurance and * * * shall be charged with the execution of the laws relating to insurance" (Sec. 2) and is appointed by the Corporation Commission (Sec. 4). On March 20, 1925, Walter B. Wagner was appointed and qualified as Superintendent of Insurance (M. 3).

The substitution of Wagner, Superintendent of Insurance, as a party defendant in lieu of Gregg (formerly) Bank Examiner, was asked under Section 11 (*b*) of the Act of Congress of February 13, 1925 (M 4). By the transfer of all powers relating to in-

surance from the Bank Examiner to the Corporation Commission the Bank Examiner *pro tanto* ceased to hold office and the Corporation Commission and the Superintendent of Insurance, head of a department within the Commission, became *pro tanto* the successor in office of the Bank Examiner. The motion for substitution was filed within six months after March 20, 1925, and was presented to this Court and submitted on the first motion day of the present term.

As head of the Department of Insurance Wagner, though not an indispensable or necessary party, is a proper party in this case. As the powers relating to insurance matters were transferred from the Bank Examiner to the Corporation Commission, the Department of Insurance was created *within the Corporation Commission* and the Superintendent of Insurance is appointed by the Corporation Commission, an injunction or other decree in this case against the Corporation Commission or its members would doubtless be effective whether Wagner is a party or not. Nevertheless, as Wagner is expressly "charged with the execution of the laws relating to insurance" (M. 3) it seems eminently proper that he be a party.

STATEMENT OF THE CASE.

From a decree dismissing the bill on final hearing the plaintiff appeals (R. 15). The bill was filed January 8, 1924 (R. 1); the final decree April 30, 1924 (R. 15).

The facts are not in dispute. Most of them are admitted by the pleadings. The rest are established by stipulation at the hearing and by affidavit or other evidence received without objection and not controverted (R. 19-20).

The plaintiff, a Maryland corporation, is a surety company and, within the meaning of the New Mexico insurance laws, a foreign insurance company authorized to do business in New Mexico. The defendants are the members of the State Corporation Commission and the State Bank Examiner of New Mexico (R. 1, 11).

The State Corporation Commission, a permanent commission consisting of three members, was created by the New Mexico Constitution (Article XI, Section 1.—R. 1-2), and made the department of government through which shall be issued all licenses to foreign corporations to do business in New Mexico (Article XI, Section 6.—R. 2). The State Corporation Commission has control and supervision of the State Bank Examiner (Laws of 1917, Chapter 56, Section 22.—R. 3). By Section 2 of Chapter 47 of the Laws of 1921 the powers and duties of the Insurance Department and the Superintendent thereof were vested in the State Bank Examiner (R. 3). Section 2814 of the Code of 1915 prohibited any company from transacting in New Mexico any insurance business unless it procured from the Superintendent of Insurance a certificate authorizing it to do business, which certificate must be renewed annually (R. 2). Before permission to a foreign insurance company to transact business and before renewal of its certificate, Section 2815 required a certificate to be filed, signed by the president of the company, that all the provisions of the New Mexico insurance laws are accepted by the company as part of the conditions of its right and authority to do business in New Mexico (R. 3).

The plaintiff for many years has been and now is transacting business in New Mexico. It has procured and annually has had renewed a certificate authoriz-

ing it to do business in New Mexico. Its certificate in force when the bill was filed was to expire February 29, 1924 (R. 3, 12).

Section 2820 of the Code of 1915, as amended by Chapter 195 of the Laws of 1921, provided:

> "It shall be unlawful for any foreign insurance company to make, write, place or cause to be made, written or placed in this State, any insurance policy or contract of any kind to provide against any contingency which may be insured or guaranteed against, unless the same shall be made, written or placed through its duly and regularly appointed and authorized agent or agents, resident of this State. *It shall be unlawful for any insurance company authorized to do business in New Mexico,* its representative, manager, general agent, special agent, local agent, broker or solicitor, *to pay* or promise to pay, either directly or indirectly *any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining,* placing or writing *of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this Section shall have its certificate of authority to do business in this State suspended for not less than one year, and such suspension shall be removed and the said certificate of authority renewed only upon a written pledge from the directors or executive body in authority over the officers of such company that this Section will be fully and faithfully observed.*" (R. 4.)

Since Section 2820 was enacted no bond or undertaking has been written or placed by the plaintiff in New Mexico unless the same purports on its face to have been made, written or placed through plaintiff's duly and regularly appointed and authorized agent or agents, residents of New Mexico (R. 4, 12, 19).

In many cases, however, in the course of the conduct of plaintiff's business, services of value have been and are rendered to plaintiff by its agents or officers or employees in other States in connection with the procurement of business so made, written and placed in New Mexico. Plaintiff's agents or branch offices in other States frequently have received and do receive applications from residents of such States for bonds guaranteeing the fidelity of New Mexico employees of such applicants. In such cases plaintiff's agents or branch offices in other States transmit such business to New Mexico, and the bonds are executed by the New Mexico employees of the applicant, and are made, written and placed by plaintiff in New Mexico through its agents, residents of New Mexico (R. 4, 12).

In such cases, however, the services rendered plaintiff by its agents or branch offices are of value to plaintiff (as the defendants admit), and necessarily must be, have been and are paid for—notwithstanding the defendants' unsupported denial that they *need* be paid for (R. 4, 12). In the case of branch offices such services are part of the regular services for which plaintiff's branch office officers and employees receive regular salaries or compensation. In the case of agencies such services are paid for by commissions on such basis as is agreed on, outside of New Mexico, between plaintiff and its agents (R. 5, 12).

The defendant Bank Examiner, asserting that the payments so made by plaintiff to its agents in other States for services rendered in connection with the procurement of business so made, written and placed in New Mexico constituted a violation by plaintiff of the provisions above italicized [*supra*, 21] of Section 2820, requested the other defendants, the State Corporation Commission, to suspend plaintiff's right to

do business in New Mexico (R. 5). After a hearing, at which plaintiff maintained that Section 2820, so construed and applied, was contrary to the Fourteenth Amendment, the State Corporation Commission determined to grant the Bank Examiner's request and to suspend for one year plaintiff's certificate of authority. The *sole reason* of said defendants for this proposed action was the fact that plaintiff made the payments to its agents in other States above mentioned (R. 6, 21-23).

Thereupon plaintiff filed its bill, stating the facts here stated, specifically averring that Section 2820, as construed and applied by the defendants, would deprive plaintiff of its property without due process of law and would deny it the equal protection of the laws, and praying (1) that Section 2820, in so far as it prohibits the payment by plaintiff of compensation to its officers, employees or agents not residents of New Mexico for services rendered wholly outside New Mexico in connection with the procurement of business made, written and placed by plaintiff in New Mexico, and in so far as it undertakes to authorize the defendants or any of them to suspend plaintiff's certificate of authority because of such payments, be declared unconstitutional and void, and (2) that the defendants and their respective successors in office, deputies, etc., be perpetually and preliminarily enjoined from suspending plaintiff's certificate of authority and *from refusing to renew* it at its expiration in February, 1924 (R. 7-8).

On motion for preliminary injunction (R. 8) a temporary restraining order was issued (R. 10) and by stipulation was continued till final hearing, hearing of the application for preliminary injunction being waived (R. 9). On final hearing on bill, answer, evi-

dence and stipulation and agreements of counsel in open court, the Court found that the defendants intend to suspend plaintiff's certificate of authority for the sole reason that plaintiff has made payments to its agents in other states in connection with the procurement of business made, written and placed by plaintiff in New Mexico, but the Court being of the opinion that such payments were by virtue of Section 2820 unlawful and that Section 2820, in so far as it applied to and made unlawful such payments and authorized suspension of plaintiff's certificate of authority because of any violation of said section by such payments, was constitutional, the bill was accordingly dismissed and the temporary restraining order was dissolved. (R. 15.)

An appeal to the Supreme Court was immediately prayed by plaintiff and allowed by the District Judge (R. 17). An order was also entered restoring and modifying the temporary restraining order so that pending this appeal to the Supreme Court the defendants are restrained from suspending and *from refusing to renew from time to time* plaintiff's certificate of authority (R. 17-18). Before final hearing a stipulation (seemingly unnecessary in view of the restraining order) for renewal of plaintiff's certificate without prejudice from month to month, pending final determination of this case, was filed. (R. 14-15.)

Plaintiff maintains that the decree of the District Court must be reversed because:

I. The State of New Mexico cannot constitutionally revoke a foreign corporation's license to do business for the sole reason that the corporation has exercised a constitutional right, *e. g.*, a right guaranteed it by the due process clause of the Fourteenth Amendment.

II. For *each* of *three* reasons the State of New Mexico cannot constitutionally prohibit payments by a foreign surety corporation of commissions to its agents in other states, not residents of New Mexico, for services rendered in other states in connection with the procurement of business (*i. e.*, contracts) made, written and placed in New Mexico in conformity with the laws of New Mexico:

(A) The State of New Mexico cannot (consistently with due process of law) *regulate* or prohibit *any thing* done *outside New Mexico* by a foreign corporation, *e. g.*, payment of commissions or other "wages" to insurance agents outside New Mexico for services rendered outside New Mexico.

(B) The State of New Mexico cannot (consistently with due process of law) *fix*—still less *prohibit*—commissions or other "*wages*" of insurance agents *anywhere* within New Mexico or outside New Mexico.

(C) Even if the State of New Mexico possessed *both* of these powers which it *does not* possess, it could not (without denying the plaintiff the equal protection of the laws) *exercise* these powers in such a way as (*a*) to *prohibit* only payment of commissions to agents in other states for lawful services rendered in other states *by them* or (*b*) to *require* payment of commissions to agents in New Mexico for services *not rendered by them*.

ASSIGNMENT OF ERRORS.

1. That the Court erred in not holding that Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the Laws of 1921, approved March 14, 1921, in so far as it prohibits or declares unlawful the payment by the plaintiff of compensation to its

officers, employees or agents not residents of the State of New Mexico for services rendered wholly outside of the State of New Mexico in connection with the procurement of business made, written and placed by the plaintiff in the State of New Mexico and in so far as it undertakes to empower and authorize the defendants or any of them to suspend the plaintiff's certificate of authority to do business in the State of New Mexico because of such payments to such non-residents of the State of New Mexico, would deprive the plaintiff of its liberty and property without due process of law and would deny to the plaintiff the equal protection of the laws, and is therefore contrary to the Fourteenth Amendment of the Constitution of the United States and is therefore null and void.

2. That the Court erred in holding that the aforesaid Section 2820, amended as aforesaid, in so far as it applies to and makes unlawful payments by the plaintiff to its agents in States other than New Mexico, not residents of New Mexico, for services rendered wholly outside of New Mexico in connection with the procurement of business made, written and placed by the plaintiff in New Mexico and authorizes the suspension of the plaintiff's certificate of authority to do business in New Mexico because of any violation of said section by such payments, is valid, constitutional legislation of the State of New Mexico binding on the plaintiff.

3. That the Court erred in not perpetually restraining and enjoining the defendants and their respective successors in office, deputies, clerks, and attorneys and all persons acting under their authority from suspending or attempting to suspend the plaintiff's certificate

of authority to do business in the State of New Mexico or from taking any further steps to that end and from refusing to renew the plaintiff's said certificate at the expiration thereof upon compliance by the plaintiff with all the requirements of the laws of the State of New Mexico relating to the renewal of such certificates, except the provisions of the aforesaid Section 2820, as amended as aforesaid in so far as they are unconstitutional and void, and except also the provisions of Section 2815 of the New Mexico Code of 1915 in so far as said provisions may purport to require as part of the conditions of the plaintiff's right and authority to transact business in the State of New Mexico the acceptance of said unconstitutional and void provisions of said Section 2820, as so amended.

4. That the Court erred in dismissing the bill of complaint (R. 16-17).

ARGUMENT.

I.

THE STATE OF NEW MEXICO CANNOT CONSTITUTIONALLY REVOKE A FOREIGN CORPORATION'S LICENSE TO DO BUSINESS FOR THE SOLE REASON THAT THE CORPORATION HAS EXERCISED A CONSTITUTIONAL RIGHT, e. g., A RIGHT GUARANTEED IT BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This is now the law; it has not always been. It was law until *Doyle vs. Continental Insurance Co.*, 94 U. S. 535, was decided in 1877. It has been law (though not broadly and explicitly so declared until later) ever since *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1,

Pullman Company vs. Kansas, 216 U. S. 56, and *Ludwig vs. Western Union Telegraph Co.*, 216 U. S. 146, were decided in 1910. During the intervening period of over thirty years from 1877 until 1910 "the cases in this Court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders and the federal constitutional right[s] of such foreign corporation * * * has been considered, cannot be reconciled." (*Terral vs. Burke Construction Co.*, 257 U. S. 529, 532.)

The cases in this Court inconsistent with the proposition above stated have now been overruled, either expressly by name or else by necessary implication, as a result of the more recent decisions.

(*a*) *Bank of Augusta vs. Earle*, 13 Pet. 519, was the first case in this Court in which the power of a state over foreign corporations, especially the power to exclude foreign corporations, was considered and discussed. *Lafayette Insurance Co. vs. French*, 18 How. 404, was the next case on this subject and the first in which the power of a state to impose conditions upon the admission of foreign corporations was stated. The careful statement of this power in the opinion of the Court by Mr. JUSTICE CURTIS explicitly excludes power to impose conditions violative of constitutional rights.

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State, 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this Court, *provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and*

authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." (Italics ours.)

Lafayette Insurance Co. vs. French, 18 How. 404, 407.

The "constitutionality of unconstitutional conditions" was not involved in *Paul vs. Virginia,* 8 Wall. 168. General language in *Paul vs. Virginia* is not inconsistent with the language just quoted from *Lafayette Insurance Co. vs. French.*

The principle of *Lafayette Insurance Co. vs. French* was followed and applied in *Insurance Co. vs. Morse,* 20 Wall. 445, in which a Wisconsin anti-removal statute, requiring as a condition of the right to do business in the state a stipulation by foreign corporations not to remove any case to a federal court, was held unconstitutional.

The principle of *Lafayette Insurance Co. vs. French* and *Insurance Co. vs. Morse* was not shaken or qualified by any decision of this Court prior to *Doyle vs. Continental Insurance Co.,* 94 U. S. 535.

(*b*) *Doyle vs. Continental Insurance Co.,* 94 U. S. 535, involved the same Wisconsin anti-removal statute which in *Insurance Co. vs. Morse* had been held unconstitutional. In the *Doyle* case the corporation had exercised its constitutional right of removal, and because of such removal the state had revoked its license. The anti-removal statute, in so far as it authorized and required the revocation of the license of any insurance company which removed a case to the federal court, was held constitutional, three Justices dissenting. The majority of this Court held that a state has power to exclude a foreign corporation entirely, and, therefore, to revoke its license for any

cause or none; that the corporation has no constitutional right to do business in the state, and that, therefore, no constitutional right is infringed by the revocation of its license for whatever cause.

After a number of later cases not reconcilable with each other, in most of which there were dissents and several of which were apparently inconsistent with the *Doyle* case, the *Doyle* case was expressly reaffirmed in *Security Mutual Life Ins. Co. vs. Prewitt,* 202 U. S. 246, decided in 1906, two Justices dissenting.

The doctrine of the *Doyle* case as thus revived in the *Prewitt* case was, however, short-lived. It was in effect overruled within four years by the cases of *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1, *Pullman Co. vs. Kansas,* 216 U. S. 56, and *Ludwig vs. Western Union Tel. Co.,* 216 U. S. 146, decided in 1910; it has never been revived again. On the contrary, in *Terral vs. Burke Construction Co.* 257 U. S. 529, 533, decided in 1922, the *Doyle* and *Prewitt* cases were expressly declared to have been overruled. The recent cases from *Western Union Tel. Co. vs. Kansas* to *Terral vs. Burke Construction Co.* have by necessary implication overruled all other earlier cases consistent with the *Doyle and Prewitt* cases and inconsistent with this later line of cases.

(*c*) *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1, and *Pullman Company vs. Kansas,* 216 U. S. 56, decided in 1910, presented the question of the constitutionality of a Kansas statute which exacted of a foreign corporation as a condition of its right to do intrastate business in Kansas a "charter fee" measured by its entire authorized capital stock, representing property outside Kansas as well as property within the state. The Western Union Telegraph Company and the Pullman Company each refused to pay the re-

quired "fee," and the Supreme Court of Kansas entered decrees prohibiting these corporations from doing intrastate business in Kansas. This Court held the Kansas statute unconstitutional, as imposing a condition forbidden by the Constitution of the United States and, by taxing property outside the state, violating constitutional rights of the companies under the due process clause of the Fourteenth Amendment, and also under the commerce clause. It was not held or suggested that rights under the commerce clause are more sacred than rights under the due process clause or the right of removal to a federal court.

In *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, 313-314, 315, 317, this Court, affirming a judgment against a foreign corporation for taxes, had expressly sustained, as not violating constitutional rights under the due process clause, a New York statute imposing a tax on foreign corporations measured in precisely the same way as the "charter fee" in the two Kansas cases.

> "There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this Court can in no way interfere."
>
> *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, 317.

In *Pembina Mining Company vs. Pennsylvania*, 125 U. S. 181, another foreign corporation tax measured in the same way had been sustained as not a denial of the equal protection of the laws, but the due process clause seems not to have been specifically relied on. Furthermore, in the Kansas cases there were no pecu-

niary judgments against the corporations for the amounts of the "charter fees" but only judgments prohibiting them from doing intrastate business in Kansas. In the *Doyle* and *Prewitt* cases and also in the *Horn Silver Mining Company* case this Court had held that the absolute power of a state to exclude a foreign corporation includes power to impose conditions on the right to do business and may be exercised regardless of whether the reason for exercising it is good or bad.

The decisions and opinions of this Court in these Kansas cases in effect necessarily overruled the *Doyle* and *Prewitt* cases and the *Horn Silver Mining Company* case, though the majority opinions did not expressly so state. The majority opinions in the Kansas cases were delivered by Mr. JUSTICE HARLAN, who had dissented in the *Horn Silver Mining Company* case and in the *Prewitt* case and perhaps preferred to leave it to others to reconcile or overrule those cases. The *Horn Silver Mining Company* case is not even mentioned in the majority opinions, though it is discussed in a concurring opinion by Mr. CHIEF JUSTICE WHITE and a dissenting opinion by Mr. JUSTICE HOLMES.

The necessary effect of the majority opinions as overruling the *Doyle* and *Prewitt* cases and the *Horn Silver Mining Company* case was recognized in the concurring opinions of the Chief Justice, who sought to reconcile those cases on grounds narrower than those of the majority opinions but did *not* dissent from the majority opinions, and in the dissenting opinions of MR. JUSTICE HOLMES. The concurring opinions of the Chief Justice disclosed his own original reluctance to accept the doctrine of the *Doyle* and *Horn Silver Mining Company* cases and foreshadowed his subse-

quent complete concurrence in repudiating that doctrine and applying and extending the principle of the majority opinions in the Kansas cases. In later cases the Justices who dissented in the Kansas cases, notably Mr. JUSTICE HOLMES, did not reiterate their dissent but accepted the Kansas cases (and the case of *Ludwig vs. Western Union Tel. Co.*, 216 U. S. 146, holding an Arkansas statute similar to the Kansas statute unconstitutional on the same grounds) as overruling the doctrine of the *Doyle* and *Prewitt* cases. Although these Kansas cases were decided by a bare majority of this Court, the principle of these cases was thus promptly accepted by the entire Court and has repeatedly been applied and extended in unanimous opinions of the court.

In his concurring opinion in *Pullman Co. vs. Kansas*, Mr. CHIEF JUSTICE WHITE said:

> "When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much as an original question I would have held a contrary view."
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> 216 U. S. 74.

At the close of his concurring opinion in *Western Union Telegraph Co. vs. Kansas*, the Chief Justice said:

> "Resting, as I do, my concurrence in the decree in this case upon the grounds just previously stated, it becomes unnecessary for me to say anything concerning the wider ground upon which the opinion of the court proceeds, but I do not

> wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies."
>
> 216 U. S. 52.

In his dissenting opinion in *Western Union Telegraph Company vs. Kansas*, Mr. JUSTICE HOLMES said:

> "I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, *Security Mut. Life Ins. Co. vs. Prewitt*, 202 U. S. 246."
>
> 216 U. S. 55.

Constitutional rights under the due process clause of the Fourteenth Amendment are no more and certainly no less sacred than rights under the commerce clause, the right of removal to a federal court or other constitutional rights. In *Western Union Telegraph Co. vs. Kansas*, this Court, referring to the "charter fee" there in question, said:

> "Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"
>
> 216 U. S. 35.

In *Baltic Mining Company vs. Massachusetts*, 231 U. S. 68, this Court said:

> "The right of a State to exclude a foreign corporation from its borders, so long as no principle of the Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe

conditions upon which a corporation of that character may continue to do business in the State unless some contract right in favor of the corporation prevents or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. *Hammond Packing Co. vs. Arkansas*, 212 U. S. 322, 343; *Southern Pacific Co. vs. Denton*, 146 U. S. 202; *Barron vs. Burnside*, 121 U. S. 186; *Insurance Co. vs. Morse*, 20 Wall. 445; *Herndon vs. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135. For example, a State may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the State. To allow a State to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

231 U. S. 83.

In *Herndon vs. Chicago, Rock Island and Pacific Ry.*, 218 U. S. 135, this Court without dissent held a Missouri anti-removal statute unconstitutional (as applied to a railroad company engaged in interstate commerce), applying the principles of the Kansas cases thus:

"As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1; *Pullman Co. vs. Kansas*, 216 U. S. 56; *Ludwig vs. Western Union Tel. Co.*, 216 U. S. 146; *Southern Railway Co. vs. Green*, 216 U. S. 400.

> "Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States."
>
> 218 U. S. 158.

In *Harrison vs. St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, this Court, holding an Oklahoma anti-removal statute unconstitutional (as applied to a railroad company engaged in interstate commerce), said:

> "The grounds of the decision in the last case [*Herndon vs. C., R. & I. Ry.*, 218 U. S. 135] show the extremely narrow scope of the rulings in the *Doyle* and *Prewitt* cases, and render their inapplicability to this case certain. Indeed, the ruling in the *Herndon* case and in those subsequent to the *Doyle* and *Prewitt* cases, most of which were reviewed in the *Herndon* case, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."
>
> 232 U. S. 333.

In *New York Life Insurance Co. vs. Head*, 234 U. S. 149, this Court, holding unconstitutional a Missouri statute which prohibited a foreign life insurance company doing business in Missouri from making in New York a certain loan agreement with the holder of a policy issued in Missouri, said:

> "It is true it has been held that in view of the power of a State over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the State, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. In other words that a company having

otherwise no right whatever for any purpose to go in without a license would not be heard after accepting the same to complain of exactions upon which the license was conditioned as unconstitutional because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled or at all events so restricted as to deprive it of all application to this case (see *Harrison vs. St. L. & San Francisco R. Co.*, 232 U. S. 318, 332, and authorities there cited,) it here can have no possible application since such doctrine at best but recognized the power of a State under the circumstances stated to impose conditions upon the right to do the business embraced by the license and therefore gives no support to the contention here presented which is that a State by a license may acquire their right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed."

234 U. S. 164.

In *Looney vs. Crane Co.*, 245 U. S. 178, this Court, holding unconstitutional a Texas statute imposing certain foreign corporation taxes measured by the entire authorized capital stock, said:

"It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the

franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intrastate business of such corporation carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore the proposition must rest upon the theory that our dual system of goveernment has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established. Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment. *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1; *Pullman Company vs. Kansas,* 216 U. S. 56; *Ludwig vs. West-*

ern Union Telegraph Co., 216 U. S. 146; *International Textbook Co. vs. Pigg*, 217 U. S. 91; *Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S. 280, 285."

245 U. S. 187-188.

In *International Paper Co. vs. Massachusetts*, 246 U. S. 135, this Court, holding unconstitutional a Massachusetts foreign corporation tax measured by entire authorized capital stock, said:

"Cases involving the validity of state legislation of this character often have been before this Court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the Court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy.

"The subject was extensively considered in *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1. A statute of Kansas was there in question. As construed by the State Court, it required a foreign corporation doing an interstate and local business in that and other States to pay a license fee or excise of a given per cent. of its authorized capital for the privilege of conducting a local business in that State. After reviewing the earlier decisions, this Court pronounced the statute invalid as being repugnant to the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. In that and two other cases (*Pullman Company vs.. Kansas*, 216 U. S. 56, and *Ludwig vs. Western Union Telegraph Co.*, 216 U. S. 146), which were before the Court at the same time, it was held:

"1. The power of a State to regulate the transaction of a local business within its borders

by a foreign corporation,—meaning a corporation of a sister State—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

* * * *

"3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State."

246 U. S. 140-142.

See also *Air-Way Corporation vs. Day*, 266 U. S. 71, 81.

In *New York Life Insurance Company vs. Dodge*, 246 U. S. 357, holding unconstitutional a Missouri statute prohibiting a foreign life insurance company doing business in Missouri and one of its Missouri policyholders from making in New York a certain loan agreement affecting the policy, this Court said:

"Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co. vs. Head*, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State

and rendered ineffective through a license authorizing the insurance company there to do business."

246 U. S. 376-377.

In *Western Union Telegraph Company vs. Foster*, 247 U. S. 105, this Court, in its opinion by MR. JUSTICE HOLMES, said:

"Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States vs. Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1. *Pullman Co. vs. Kansas*, 216 U. S. 56. *Sioux Remedy Co. vs. Cope*, 235 U. S. 197, 203."

247 U. S. 114.

In *Frick vs. Pennsylvania*, 268 U. S. , 45 Sup. Ct. 603, decided June 1, 1925, this Court, holding unconstitutional a Pennsylvania tax on the transfer of tangible personal property situated outside Pennsylvania belonging to a Pennsylvania decedent, said:

"Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co. vs. Foster*, 247 U. S. 105, 114, and cases cited; *Looney vs. Crane Company*, 245 U. S. 178, 188; *International Paper Co. vs. Massachusetts*, 246 U. S. 135, 141; *Air-Way Corporation vs. Day*, 266 U. S. 71, 81; *Wallace vs. Hines*, 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company vs. Kentucky*, 188 U. S. 385, 395."

268 U. S. , 45 Sup. Ct. 606-607.

In *National Insurance Co. vs. Wanberg*, 260 U. S. 71, this Court said:

> "Moreover, as the business of such insurance companies is purely intrastate, *New York Life Insurance Co. vs. Deer Lodge County*, 231 U. S. 495, the State has power to require them to accept conditions different from those imposed on domestic corporations (*Paul vs. Virginia*, 8 Wall. 168; *Hooper vs. California*, 155 U. S. 648, and cases cited), though this is not, of course, unlimited. *Terral vs. Burke Construction Co.*, 257 U. S. 529, 532, 533."
>
> 260 U. S. 75.

In *Terral vs. Burke Construction Co.*, 257 U. S. 529, though the Kansas cases in 216 U. S. were not mentioned in the opinion, the principle of those cases and the later cases (cited in the opinion) following them was concisely stated in the unanimous opinion of this Court delivered by the present Chief Justice. In the *Terral* case it was held that a state law which revokes the license of a foreign corporation to do business within the state because, while doing only a domestic business in the state, it resorts to the federal court sitting in the state is unconstitutional. The opinion in terms refers to the constitutional right to resort to the federal court. The principle stated in the opinion is equally applicable to *any* constitutional right. The right of removal was the particular constitutional right involved in that case. The same right had been involved in the *Doyle* and *Prewitt* cases, which had not yet been expressly declared overruled and which were the most conspicuous cases that had sustained the constitutionality of "unconstitutional conditions." The *Terral* case therefore announced no peculiar or limited rule applicable to the right of removal; it only applied to the right of removal—to the extent of com-

pletely overruling the *Doyle* and *Prewitt* cases—the general principle which had already been established as to *all* constitutional rights and had been repeatedly applied to constitutional rights guaranteed by the due process clause of the Fourteenth Amendment.

If in the opinion in the *Terral* case there be substituted for the words "resorts to the federal court sitting in the State" a more general expression, *e. g.*, "exercises a federal constitutional right" and two other references to the constitutional right "to resort to the federal courts" be made general by omitting the last quoted words, then the opinion in words as well as in principle is equally applicable to any constitutional right, including rights guaranteed by the due process clause of the Fourteenth Amendment. The entire opinion (except the statement of the case) with the change and the omissions just suggested is as follows:

> "The sole question presented on the record is whether a State law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it * * * " exercise a federal constitutional right.
>
> "The cases in this Court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation * * * has been considered, cannot be reconciled. They began with *Insurance Co. vs. Morse*, 20 Wall. 445, which was followed by *Doyle vs. Continental Insurance Co.*, 94 U. S. 535; *Barron vs. Burnside*, 121 U. S. 186; *Southern Pacific Co. vs. Denton*, 146 U. S. 202; *Martin vs. Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 684; *Barrow S. S. Co. vs. Kane*, 170 U. S. 100, 111; *Security Mutual Life Insurance Co. vs. Prewitt*, 202 U. S. 246; *Herndon vs. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135; *Harrison vs. St. Louis*

& San Francisco R. R. Co., 232 U. S. 318, and *Wisconsin vs. Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329.

"The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right * * * or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers * * * the right * * *, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of *Doyle vs. Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual Life Insurance Co. vs. Prewitt*, 202 U. S. 246, must be considered as overruled, and that the views of the minority judges in those cases have become the law of this Court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him, the District Court was right, and its decree is affirmed."

Terral vs. Burke Contr. Co., 257 U. S. 529, 531-533.

In *Doyle vs. Continental Insurance Co.*, 94 U. S. 535, the dissenting opinion of MR. JUSTICE BRADLEY, concurred in by MR. JUSTICE SWAYNE and MR. JUSTICE MILLER (whose "views * * * have become the law of this court"), clearly pointed out the fallacy in the now discarded doctrine of the *Doyle* and *Prewitt* cases, thus:

> "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."
> 94 U. S. 543-544.

No case in this Court since *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, supports an argument that a State may exclude a foreign corporation for the reason that the corporation exercises and refuses to abandon *any* federal constitutional right, *e. g.*, rights guaranteed by the due process clause of the Fourteenth Amendment. Whatever a foreign corporation has a constitutional right to do and a State has no power to prohibit and punish directly, the State is equally powerless to prohibit or punish indirectly by revoking the license to do business. Foreign corporations no longer are *caput lupinum*.

II.

FOR EACH OF THREE REASONS THE STATE OF NEW MEXICO CANNOT CONSTITUTIONALLY PROHIBIT PAYMENTS BY A FOREIGN SURETY CORPORATION OF COMMISSIONS TO ITS AGENTS IN OTHER STATES, NOT RESIDENTS OF NEW MEXICO, FOR SERVICES RENDERED IN OTHER STATES IN CONNECTION WITH THE PROCUREMENT OF BUSINESS (i. e., CONTRACTS) MADE, WRITTEN AND PLACED IN NEW MEXICO IN CONFORMITY WITH THE LAWS OF NEW MEXICO.

A.

The State of New Mexico cannot (consistently with due process of law) REGULATE or prohibit ANYTHING done OUTSIDE NEW MEXICO by a foreign corporation, e. g., payment of commissions or other "wages" to insurance agents outside New Mexico for services rendered outside New Mexico.

(*a*) The line should be clearly drawn between what is and what is not in dispute as to the constitutionality of the legislation in question, viz., Section 2820 of the Code of 1915 (and Section 68 of the Act of 1925.) This legislation concerns, among other things, two transactions in the insurance business, (*a*) the "writing" of insurance, *i. e.*, the completion of a contract of insurance by execution and delivery of a policy, bond or other written instrument, and (*b*) the "obtaining" or procuring (in modern parlance "selling") of insurance, *i. e.*, the solicitation and negotiation preceding completion of the contract, whether the contract be first solicited by the insured, by an agent of the company or by a broker or other intermediary as agent

of either or both of the parties. These two transactions may be, and in practice are, combined in three classes of cases, viz., (1) cases in which insurance is both *obtained* and *written* within the State of New Mexico; (2) cases in which insurance is both *obtained* and *written* outside the State of New Mexico; and (3) cases in which insurance is *obtained* outside New Mexico but *written* in New Mexico.

Only the third of these three classes is the subject of actual dispute in this case. In the first class, viz., when insurance is both *obtained* and *written* in New Mexico, the plaintiff does not dispute the power of the State of New Mexico to regulate both the *obtaining in New Mexico* and the *writing in New Mexico*. In such cases, both the obtaining in New Mexico and the writing in New Mexico may constitutionally be restricted to residents. (*LaTourette vs. McMaster*, 248 U. S. 465). In the second class, viz., when insurance is both obtained and written outside New Mexico, the State of New Mexico has no power whatever to regulate or prohibit either the obtaining or the writing of insurance outside New Mexico, even though a citizen of New Mexico, *while within the State of New Mexico*, (*Allgeyer vs. Louisiana*, 165 U. S. 578), or a foreign corporation authorized to do business in New Mexico (*St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346), be one or *both* (*New York Life Insurance Co. vs. Dodge*, 246 U. S. 357) of the parties who obtain and write such insurance outside New Mexico. The second sentence in Section 2820 (and likewise the first sentence in Section 68) [Appendix A, *infra*, 106-107] is broad enough to cover this second as well as the third class of cases. The defendants, however, have not actually attempted to enforce the law in this class of cases. In other words, the defendants have not

attempted to revoke plaintiff's license because plaintiff pays for services rendered outside New Mexico in connection with insurance obtained *and written* outside New Mexico.

In the third class of cases, viz., when insurance is obtained outside New Mexico but written in New Mexico—the subject of actual dispute in this case—the State of New Mexico by Section 2820 (and Section 68 of the Act of 1925) attempts to regulate not only the *writing in New Mexico*, but also the *obtaining outside New Mexico*. The plaintiff concedes the power of the State to regulate the writing in New Mexico but denies the power of the State to regulate the obtaining outside New Mexico.

In effect the contention of the State of New Mexico is that, because it has power to regulate a contract of insurance between the plaintiff and an insured made in New Mexico, it also has power to regulate—and prohibit—a contract of employment between the plaintiff and an agent of the plaintiff made and to be performed outside New Mexico. This is a *non sequitur*. Power to regulate contracts and transactions within the state does not carry with it power to regulate contracts and transactions outside the state. Quite the contrary. The power of one state ends where the power of another begins—at the boundary line.

Nor does the fact that two or more contracts affect somewhat the same subject matter—or indeed that a contract of insurance may itself be the subject matter of other contracts—merge, and thereby destroy the identity of the different contracts. (*N. Y. Life Insurance Co. vs. Deer Lodge County*, 231 U. S. 495, 510). If it did, then the insurance transactions involved in this case would be interstate commerce, beyond the power of regulation by the State of New

Mexico. For the very reason that it does *not*, this Court in the case last cited reaffirmed the ruling in *Paul vs. Virginia*, 8 Wall. 168, and subsequent cases, that insurance is *not* commerce but a personal contract. A personal contract of insurance solicited in New York but made in New Mexico is subject to regulation by the State of New Mexico. A personal contract of employment made and to be performed in New York, relating to a New Mexico insurance contract, is subject to regulation by the State of New York. The State of New Mexico has no more power to regulate a New York contract of employment than the State of New York has to regulate a New Mexico contract of insurance. If either State could regulate both contracts, then both States could do so. Each contract would be subject to dual regulation by two independent States. The greater the number of related contracts, the greater the number of States empowered to impose conflicting regulations. Thus extra-territorial legislation by the States would produce the same confusion as State regulation of interstate commerce. Recognizing this fact, this Court from the beginning has confined the powers of the States no less strictly within their territorial limits than within the limits imposed by the commerce clause of the Constitution.

The facts of this case do not present the subtleties of unlawful acts begun in one State and completed in another, *e. g.*, a shot fired across the border, a crime committed by use of the mails, or a conspiracy. If the plaintiff, authorized to do business in New Mexico only as a surety company, should procure in New York, to be written in New Mexico, and write in New Mexico a contract of fire insurance, this would be an unlawful contract in violation of the laws of New Mexico. The

State of New Mexico constitutionally could punish such a violation of its laws and every step in the violation, those taken in New York as well as those taken in New Mexico. (*Strassheim vs. Dailey*, 221 U. S. 281, 284-285.)

The State of New Mexico can prohibit the making of a contract of insurance in New Mexico, whether procured in New Mexico or outside New Mexico. It cannot prohibit the making in New Mexico of an otherwise lawful contract of insurance merely *because* the contract was solicited in another State. The line between two states is not less, but more, distinct than the constitutional line between federal jurisdiction over interstate commerce and state jurisdiction over local manufacture. Congress cannot prohibit interstate transportation of goods, otherwise lawful subjects of commerce, merely because the goods, before they came into interstate commerce, had beyond the jurisdiction of Congress and within the jurisdiction of a state been manufactured by child labor. (*Hammer vs. Dagenhart*, 247 U. S. 251.) Prohibition of things within the jurisdiction, merely *because* they result from things beyond the jurisdiction, is not regulation of anything within the jurisdiction but is an attempt to regulate things beyond under the pretense of regulating those within. (*Hammer vs. Dagenhart*, 247 U. S. 251, 271-272, 276; *Child Labor Tax Case*, 259 U. S. 20, 39.)

If the State of New Mexico should prohibit all use of firearms, *e. g.*, target shooting, in cities and towns, it could prohibit shooting across the state line at a target in New Mexico. It could *not* permit target shooting generally and prohibit shooting across the line merely *because* the shot comes from another state. The State of New Mexico can prohibit a New York physician or lawyer from practising at all in New

Mexico. It can *not* prohibit a resident of New York from *paying* his New York physician or lawyer for advice about going to New Mexico for an operation by a New Mexico surgeon or for trial of a case by a New Mexico lawyer.

In fact the State of New Mexico does not profess to prohibit the *making* in New Mexico of a contract of insurance obtained outside New Mexico, or even the *obtaining* of such a contract outside New Mexico. The only thing the State of New Mexico professes to prohibit is *payment* by the plaintiff outside New Mexico of compensation for lawful services rendered outside New Mexico in obtaining outside New Mexico a lawful contract of insurance, written in New Mexico in strict compliance with the laws of New Mexico. The plaintiff and its agents outside New Mexico may work as hard as they please outside New Mexico to obtain business written in New Mexico, provided only the plaintiff does *not* pay the agents who do the work but pays New Mexico agents who do *not* do the work.

(*b*) Extra-territorial legislation by a state transcends not only the express limitations of the due process clause of the Fourteenth Amendment, but also implied limitations on state power resulting from the very nature of our federal government and consequently long antedating the Fourteenth Amendment.

In *McCulloch vs. Maryland*, 4 Wheat. 316, this Court, in its opinion by CHIEF JUSTICE MARSHALL, said:

> "All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."
>
> 4 Wheat. 429.

This language was not used with special reference to territorial limits of sovereignty, but has repeatedly since been so applied. (*Louisville, etc., Ferry Co. vs. Kentucky*, 188 U. S. 385, 396.) The same limits of sovereignty have also repeatedly been applied, before as well as since the adoption of the Fourteenth Amendment, not only to the power of taxation but to legislative powers generally.

One of the first subjects concerning which this Court enforced the *implied* territorial limitations upon state legislative power was the regulation of contracts. In *Ogden vs. Saunders*, 12 Wheat. 213, 368, this Court held that in the absence of bankruptcy legislation by Congress a state insolvency law can discharge a debt contracted after the passage of the law, but *not* a debt owing to a citizen of another State. This decision was repeatedly reaffirmed (*Boyle vs. Zacharie*, 6 Pet. 348, 635, 643; *Suydam vs. Broadnax*, 14 Pet. 67, 75; *Cook vs. Moffat*, 5 How. 295, 308-309; Cf. *McMillan vs. McNeill*, 4 Wheat. 209), even when the contract was made and to be performed in the debtor's state. (*Baldwin vs. Hale*, 1 Wall. 223; *Baldwin vs. Bank of Newbury*, 1 Wall. 234.) The principle of these cases was concisely stated in *Gilman vs. Lockwood*, 4 Wall. 409, thus:

> "Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case. *Baldwin vs. Hale*, 1 Wall. 223; *Baldwin vs. Bank of Newberry*, 1 Wall. 234."
>
> 4 Wall. 411.

The principle of these cases is quite the opposite of the State of New Mexico's contention in the present case. Because a New Mexico contract of insurance and a New York contract of employment affect somewhat the same general subject matter, the State of New Mexico having power over one contract asserts power over both. In the insolvency cases cited this Court holds that, because a state has *not complete* power over a debt and also over *both* parties to the contract, it has *no power* at all to discharge the debt or to release either party to the contract.

In *Hays vs. Pacific Mail Steamship Co.*, 17 How. 596, this Court, holding that the State of California has no jurisdiction to tax vessels whose *situs*, actual and legal, is outside the state, said:

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."
>
> 17 How. 599-600.

Hays vs. Pacific Mail Steamship Company was followed on similar facts in *St. Louis vs. Ferry Co.*, 11 Wall. 423, and *Morgan vs. Parham*, 16 Wall. 471, both of which arose before but were decided after the adoption of the Fourteenth Amendment.

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in

any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

St. Louis vs. Ferry Co., 11 Wall. 423, 430.

In *Railroad Company vs. Jackson*, 7 Wall. 262, (which also arose before the adoption of the Fourteenth Amendment), this Court held unconstitutional a Pennsylvania statute requiring a Maryland corporation, which owned a railroad lying partly in Maryland and partly in Pennsylvania, to deduct a Pennsylvania tax from the interest paid by the Maryland corporation on its bonds.

"Our conclusion on this branch of the case is, that to permit the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."

Railroad Company vs. Jackson, 7 Wall. 262, 268.

In *Erie Railroad vs. Pennsylvania*, 153 U. S. 628, this Court held unconstitutional a Pennsylvania statute requiring a New York corporation to deduct a Pennsylvania tax from interest paid in New York by the corporation to bondholders who were residents of Pennsylvania. Referring to this statute, this Court said:

"It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania."

* * * *

"The New York, Lake Erie & Western Railroad Company is not subject to regulations established

by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another State, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Railroad Co. vs. Jackson*, 7 Wall. 262; *St. Louis vs. Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206."

153 U. S. 628, 645, 646.

In *State Tax on Foreign-Held Bonds*, 15 Wall. 300 (in which the statute involved became effective before the adoption of the Fourteenth Amendment and the Fourteenth Amendment was not mentioned), a Pennsylvania statute taxing interest on bonds of Pennsylvania corporations owned by non-residents of Pennsylvania was held unconstitutional.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. * * * Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. * * *

"The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. * * *

"We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. * * * The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of state laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this Court. *Ogden vs. Saunders*, 12 Wheat. 214; *Baldwin vs. Hale*, 1 Wall. 223. A like invalidity must, on similar grounds, attend state legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State."

State Tax on Foreign-Held Bonds, 15 Wall. 300, 319, 320, 325-326.

On the very question of the validity of conditions imposed upon foreign corporations this Court in the first case on the subject, decided before the adoption of the Fourteenth Amendment, in its statement through Mr. Justice Curtis of the power of a state, did not omit reference to the territorial limitations upon state power:

"A corporation created by Indiana can transact business in Ohio only with the consent, express

or implied, of the latter State, 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this Court, *provided they are not* repugnant to the Constitution or laws of the United States, or *inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others*, or that principle of natural justice which forbids condemnation without opportunity for defense." (Italics ours.)

Lafayette Insurance Company vs. French, 18 How. 404, 407.

Since the adoption of the Fourteenth Amendment this Court in a long line of cases has held that extra-territorial legislation violates the due process clause of the Fourteenth Amendment. In such cases the decision rests on the same fundamental grounds as the cases before the adoption of the Fourteenth Amendment. The due process clause only furnishes a new name to characterize the total absence of state power of extra-territorial legislation which results from the very nature of our federal system of government. All state legislative powers are confined within the territorial limits of the state. Where the power of one state begins the power of another state ends—at the border. Where the power of all states ends the exclusive power of the federal government in foreign affairs begins. Extra-territorial legislation by a state is incompatible with the exclusive powers of other states within their territorial limits and of the United States in foreign affairs outside all state boundaries. Thus a state is without power to tax tangible property of its own citizens which has an actual *situs* either in another state (*Frick vs. Pennsylvania*, 268 U. S. , 45 Sup. Ct. 603,

decided June 1, 1925, and cases cited) or even in a foreign country (*Selliger vs. Kentucky*, 213 U. S. 200). The United States on the other hand can tax property of its citizens which is situated in foreign countries (*United States vs. Bennett*, 232 U. S. 299) or the income therefrom, even when the owner is domiciled abroad (*Cook vs. Tait*, 265 U. S. 47).

> "The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, * * *."
>
> *United States vs. Bennett*, 232 U. S. 299, 306; quoted in *Frick vs. Pennsylvania*, 268 U. S. , 45 Sup. Ct. 603, 605, decided June 1, 1925.

"We may make further exposition of the national power as the case depends upon it. It was illustrated at once in *United States vs. Bennett* by a contrast with the power of a State. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed out, upon the national power; and the limitation upon the States

affords, it was said, no ground for constructing a barrier around the United States 'shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.' "

Cook vs. Tait, 265 U. S. 47, 55-56.

In *Frick vs. Pennsylvania*, 268 U. S. , 45 Sup. Ct. 603, this Court held that a state is without power to tax the transfer of tangible personal property of decedent citizens which has an actual *situs* in other states. In so holding this Court summarized the previous cases on the subject of extra-territorial tax legislation thus:

"This precise question has not been presented to this Court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible property having an actual situs in a particular State, the power to subject it to state taxation rests exclusively in that State, regardless of the domicil of the owner. *Cleveland, Painesville and Ashtabula R. R. Co. vs. Pennsylvania*, 15 Wall. 300, 319, 325; *Louisville and Jeffersonville Ferry Co. vs. Kentucky*, 188 U. S. 385, 396; *Old Dominion Steamship Co. vs. Virginia*, 198 U. S. 299; *Delaware, Lackawana and Western R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 356; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U S. 194; *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1, 38; *International Paper Co. vs. Massachusetts*, 246 U. S. 135, 142."
268 U. S. , 45 Sup. Ct. 604.

In *Alpha Portland Cement Company vs. Massachusetts*, 268 U. S. , 45 Sup. Ct. 477, this Court said:

> "It must now be regarded as settled that a State may not * * * tax property beyond her borders under the guise of regulating or taxing intrastate business. * * * the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. vs. Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."
>
> 268 U. S. , 45 Sup. Ct. 481.

See also *Air-Way Corporation vs. Day*, 266 U. S. 71, 81, quoting *International Paper Co. vs. Massachusetts*, 246 U. S. 135, 141-142.

No state legislative power is less limited than the sovereign power of taxation. Accordingly the same territorial limitations upon state taxation are no less applicable to other legislation. This is illustrated by the cases already cited [*supra*, 52], decided before the adoption of the Fourteenth Amendment, holding that state insolvency laws cannot discharge a debt owing to a citizen of another state. Since the adoption of the Fourteenth Amendment this Court has applied the same territorial limitations to state legislation affecting contracts, notably to insurance legislation.

The leading case in this Court upholding the "freedom of contract" guaranteed by the due process clause of the Fourteenth Amendment is *Allgeyer vs. Louisiana*, 165 U. S. 578. That case held that a State cannot constitutionally prohibit one of its citizens, while within the state, from making outside the state a con-

tract of insurance on property within the state with a foreign corporation not authorized to do business in the state; nor can the state punish such citizen for subsequently doing an act within the state, viz., mailing a notice, pursuant to such contract made outside the state.

"The Supreme Court of Louisiana says that the act of writing, within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

* * * * * * *

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agent doing business there-

in, which are in violation of the state statutes. Such acts come within the principle of the *Hooper case* (*supra*) [155 U. S. 648], and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and juris-

diction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken vs. Pratt*, 125 Mass. 374; *Tilden vs. Blair*, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State."

165 U. S. 589, 590-592.

In *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, this Court reaffirmed the *Allgeyer case* and held that an Arkansas statute imposing a so-called tax on persons insuring their property situate in Arkansas with insurers not authorized to do business in Arkansas is unconstitutional as applied to insurance contracts made and paid for outside Arkansas by a for-

eign corporation authorized to do business in Arkansas. In so holding this Court said:

> "It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside."
>
> 260 U. S. 349.

In *New York Life Ins. Co. vs. Head*, 234 U. S. 149, a life insurance policy issued by a foreign corporation authorized to do business in Missouri and delivered in Missouri was assumed to be a Missouri contract and as such subject to the operation of a so-called Missouri anti-forfeiture statute regulating loans on life insurance policies. The holder of the policy made in New York a loan contract with the insurance company. This loan contract, if made in Missouri, would have been invalid because in violation of the Missouri anti-forfeiture statute. If valid the loan contract had the effect of discharging the original contract of insurance. This Court held the Missouri anti-forfeiture statute unconstitutional as applied by the Missouri courts to invalidate the subsequent loan contract made in New York and lawful in New York. In so holding this Court said:

> "Coming to the merits, to narrow the subject to be decided as much as possible, we pass the consideration of the ruling below holding that under the proof the contract was a Missouri contract and therefore for the sake of argument only concede that there was power in the State to treat the contract made for the purposes stated as a Missouri contract and to subject it as to matters and things which were legitimately within the state authority to the rule of the state law. And this concession brings us to consider the second

general inquiry which is the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made. That is to say, the right of a State where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the State in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made. In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result

of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle, however, lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause. [Citing cases.]

"It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer vs. Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." [Citing cases.]

234 U. S. 160-162.

After stating the reasoning of the court below, this Court said:

"But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers

and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority."

234 U. S. 163-164.

In *New York Life Ins. Co. vs. Dodge*, 246 U. S. 357, this Court reaffirmed the cases of *Allgeyer vs. Louisiana* and *New York Life Insurance Company vs. Head*. The *Dodge* case and the *Head* case both involved the same Missouri anti-forfeiture statute. In the *Dodge* case the original contract of insurance was made in Missouri between a citizen of Missouri and a foreign insurance company authorized to do business in Missouri. A subsequent loan contract was made in New York between the insured, while in the state of Missouri, and the insurance company, while still authorized to do business in Missouri. Under these circumstances this Court held the Missouri anti-forfeiture statute unconstitutional as applied to the subsequent loan contract made in New York.

"In *Allgeyer vs. Louisiana*, 165 U. S. 578, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that State to place insurance upon property located there by contract made and to be performed beyond its borders. We said 'the mere fact that a citizen may be within the limits of a particular

State does not prevent his making a contract outside its limits while he himself remains within it' and ruled that under the Fourteenth Amendment the right to contract outside for insurance on property within a State is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established. *Nutting vs. Massachusetts*, 183 U. S. 553, 557; *Delamater vs. South Dakota*, 205 U. S. 93, 102; *Provident Savings Assn. vs. Kentucky*, 239 U. S. 103, 114; *Adams vs. Tanner*, 244 U. S. 590, 595."

* * * * * *

"Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co. vs. Head*, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, Section 7897 transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment."

New York Life Ins. Co. vs. Dodge, 246 U. S. 357, 373-374, 376-377.

In *Aetna Life Insurance Co. vs. Dunken*, 266 U. S. 389, a term policy of life insurance was issued and delivered in Tennessee, convertible at the sole option

of the insured into a twenty-payment policy. Subsequently the insured, after he had become a citizen and resident of Texas and while the insurance company was authorized to do business in Texas, exercised his option of conversion by exchanging his term policy for a twenty-payment policy. The insured died. In a suit on the policy the Texas courts held applicable a Texas statute imposing a penalty of twelve per cent. and allowing attorneys' fees for failure of an insurance company to pay a loss within thirty days. This Court held that the original policy was a Tennessee contract and the converted policy, being executed under the optional privilege granted by the original contract and in exact compliance with its terms, was a subsidiary and not an independent agreement and the rights and obligations of the parties were controlled by the law of the original contract. Accordingly the Texas statute was held unconstitutional as applied to the Tennessee contract. In so holding this Court said:

> "The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. The Texas statute was incapable of being constitutionally applied to it since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws under which penalties and attorney's fees are not recoverable. *New York Life Ins. Co. vs. Head*, 234 U. S. 149; *Overby vs. Gordon*, 177 U. S. 214, 222. * * * * * *
>
> "From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is not subject to the Texas statute relating to penalties and attorney's fees, but is controlled by Tennessee

> law. The judgment below, therefore, in so far as it gives effect to the Texas statute by imposing a penalty of twelve per cent. and allowing attorney's fees, is erroneous, in that the Texas statute cannot constitutionally be applied to a Tennessee contract."
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> 266 U. S. 399, 400.

The decisions of this Court leave no loophole for extra-territorial legislation of any kind under any pretext. The State of New Mexico has no right to affect the parties to an original contract of insurance made in New Mexico "with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made." (*New York Life Ins. Co. vs. Head*, 234 U. S. 149, 161.) *A fortiori* the State of New Mexico has no power to affect *one* of the parties to such contract of insurance, *before* as well as after the contract of insurance is made, with a perpetual contractual paralysis preceding as well as following it outside the jurisdiction of the State of New Mexico, by prohibiting it from making a contract of *employment*, with agents outside New Mexico, not directly concerning but only incidentally relating to the New Mexico contract of *insurance*.

The State of New Mexico cannot prohibit both parties to a New Mexico contract of insurance from making outside New Mexico a subsequent contract, which they could not lawfully make in New Mexico, directly discharging and annulling a New Mexico contract of insurance. (*New York Life Ins. Co. vs. Dodge*, 246 U. S. 357, *supra* 67-68.) *A fortiori* the State of New

Mexico cannot prevent a foreign insurance company from making outside New Mexico a contract of employment with agents outside New Mexico for services to be rendered outside New Mexico, which does not annul the New Mexico contract of insurance, affect or change any term of the New Mexico contract of insurance or affect the New Mexico contract at all—except to help bring it into existence.

The State of New Mexico cannot prohibit an owner of property in New Mexico from making outside New Mexico a contract of insurance of his New Mexico property. (*Allgeyer vs. Louisiana*, 165 U. S. 578; *St. Louis Compress Company vs. Arkansas*, 260 U. S. 346.) *A fortiori* the State of New Mexico cannot prohibit a party to a New Mexico contract of *insurance*, made or to be made, from making outside New Mexico a contract of *employment* for services outside New Mexico in soliciting and obtaining the contract of insurance. If state sovereignty over real property and tangible personalty within the state does not include the power of extra-territorial legislation concerning a personal contract of insurance relating to such property, then state control over one personal contract of *insurance* can be no more potent in drawing unto itself control over another personal contract of *employment* only incidentally affecting the former contract. In this respect the legal *situs* of an intangible *res*, such as a personal contract of insurance, cannot have more significance than the actual and legal *situs* of real property and tangible personalty, so far as collateral contracts indirectly relating to the *res* are concerned.

B.

The State of New Mexico cannot (consistently with due process of law) FIX—still less PROHIBIT—commissions or other "WAGES" of insurance agents ANYWHERE, within New Mexico or outside New Mexico.

(*a*) Constitutionality of "wage" legislation is a subject exhaustively covered in recent opinions of this Court, notably in cases involving the Adamson Law (*Wilson vs. New*, 243 U. S. 332; *Ft. Smith & W. R. Co. vs. Mills*, 253 U. S. 206), the District of Columbia minimum wage law (*Adkins vs. Children's Hospital*, 261 U. S. 525), and the Kansas Industrial Court Act (*Wolff Co. vs. Industrial Court*, 262 U. S. 522; S. C., 267 U. S. 552).

In an opinion for the unanimous Court, delivered by the present Chief Justice, this Court, speaking of the Kansas Industrial Court Act, said:

> "It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer vs. Nebraska, ante*, 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins vs. Children's Hospital*, 261 U. S. 525.
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> * * * * * *
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> "To say that a business is clothed with a public interest, is not to determine what regulation

may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

* * * * * *

"It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service."

Wolff vs. Industrial Court, 262 U. S. 522, 534, 539, 541.

In the case last cited counsel for the State of Kansas relied on *Wilson vs. New*, 243 U. S. 332, in which the Adamson Law had been held constitutional, as supporting the constitutionality of the Kansas Industrial Court Act. This Court distinguished *Wilson vs. New* and rejected this argument, saying, among other things:

> "But the chief and conclusive distinction between *Wilson vs. New* and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co. vs. Railroad Commission*, 251 U. S. 396; *Bullock vs. Railroad Commission*, 254 U. S. 513, it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.
>
> "The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson vs. New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to

justify extending the drastic regulations sustained in that exceptional case to the one before us.

"We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

Wolff vs. Industrial Court, 262 U. S., 522, 543-544.

Wilson vs. New, 243 U. S. 332, is the only case in this Court in which an act fixing minimum wages has been held constitutional. [In exceptional cases *maximum* fees to lawyers, not from a regular "employer" but *from particular classes of persons*, may be fixed by statute. *Frisbie vs. United States*, 157 U. S. 160; *Calhoun vs. Massie*, 253 U. S. 170; *Yeiser vs. Dysart*, 267 U. S. 540.] In holding the Adamson Law constitutional this Court did *not* hold that freedom of contract in fixing wages can constitutionally be denied by wage-fixing legislation. On the contrary this Court said:

"It is * * * true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

243 U. S. 347.

The Adamson Law was sustained as amounting in substance and effect to a compulsory arbitration of a dispute as to wages in order to compel the continued operation of the railroads in a national emergency. (243 U. S. 351). It was sustained, not as supplanting

freedom of contract by legislation, but as *compelling continued operation* of the railroads in spite of the failure of both parties to exercise their freedom of contract by agreeing as to wages. (243 U. S. 347-348, 351-352.) This is illustrated by the subsequent case of *Ft. Smith & W. R. Co. vs. Mills*, 253 U. S. 206, in which it was held that the Adamson Law, although in general terms purporting to apply to all railroads and railroad employees subject to the Interstate Commerce Act, was not intended to govern the case of an insolvent railroad operating at a loss under a voluntary agreement with its employees allowing them less wages than those prescribed by the law.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates (*German Alliance Insurance Co. vs. Kansas*, 233 U. S. 389), and also regulation of those engaged in the business (*La Tourette vs. McMaster*, 248 U. S. 465, 467), but not legislative fixing of "wages" paid by insurance companies to their agents or other employees. Among businesses clothed with a public interest justifying some public regulation only a limited class are subject to the affirmative duty of rendering a public service demanded by any member of the public. (*Wolff Co. vs. Industrial Court*, 262 U. S. 522, 535). Insurance is *not* within this limited class. An insurance company can not be compelled by law to serve all comers. (*German Alliance Insurance Co. vs. Kansas*, 233 U. S. 389, 405, 407, 429; *Terminal Taxicab Co. vs. District of Columbia*, 241 U. S. 252, 256; *National Insurance Co. vs. Wanberg*, 260 U. S. 71, 76-77; *Wolff Co. vs. Industrial Court*, 262 U. S. 522, 537-538; *Merchants Liability Co. vs. Smart*, 267 U. S. 126, 130). Since insurance companies cannot be compelled to continue to serve the public, "wages" of insurance

agents or other employees can not be fixed, by compulsory arbitration or otherwise by statute, to compel continued service. (*Wolff Co. vs. Industrial Court, supra.*)

The State of New Mexico does not pretend that there is any dearth of insurance agents in New Mexico, and therefore any need for legislative fixing of "wages" of insurance agents in New Mexico—or outside of New Mexico—in order to insure or compel service to the public by insurance companies in New Mexico. On the contrary the New Mexico Act of 1925 (Chapter 135) indicates that there are too many insurance agents in New Mexico; it attempts to limit the number to be appointed by each insurance company to one "in any city, town or village for each kind of insurance that the said company is licensed to contract," (Section 69)—a legislative restriction which in at least one state had already been held unconstitutional. (*Northwestern Insurance Co. vs. Fishbach*, 130 Wash. 490).

In *Adkins vs. Children's Hospital*, 261 U. S. 525, this Court held unconstitutional the District of Columbia minimum wage law, relating to wages of women, as applied in one case to a woman twenty-one years old employed at a hotel as an elevator operator. (261 U. S. 542.) This minimum wage law was held an unconstitutional interference with the freedom of contract of both employers and employees. In the course of its opinion this Court said:

> "The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a

part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. *Allgeyer vs. Louisiana*, 165 U. S. 578, 591; *New York Life Insurance Co. vs. Dodge*, 246 U. S. 357, 373-374; *Coppage vs. Kansas*, 236 U. S. 1, 10, 14; *Adair vs. United States*, 208 U. S. 161; *Lochner vs. New York*, 198 U. S. 45; *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746; *Muller vs. Oregon*, 208 U. S. 412, 421. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

* * * * * *

"A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages."

Adkins vs. Children's Hospital, 261 U. S. 545, 554.

In *Adkins vs. Children's Hospital* three Justices of this Court dissented. Two of the dissenting Justices were of the opinion that a minimum wage law appli-

cable only to women is an exception to the general rule of freedom of contract, justifiable as within the broad power to legislate for the protection of women. Mr. JUSTICE HOLMES alone went so far as to endorse an opinion that in industrial relations "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee." (261 U. S. 571). There is nothing in either of the dissenting opinions to indicate that any of the dissenting Justices would sustain the constitutionality of a minimum "wage" law applicable only to insurance agents.

Insurance agents as a class are subject neither to the physical limitations of women nor to the economic limitations of the ordinary industrial employee referred to by Mr. JUSTICE HOLMES. Measured by pecuniary standards insurance agents, as a class, are at least the economic equals of physicians, lawyers and other professional men. No class is better able to take care of itself in the exercise of freedom of contract as to compensation—or, the statute books suggest, in influencing legislation in their own interests. Nor is the New Mexico legislation involved in this case applicable primarily, if at all, to downtrodden subordinate employees who conceivably might need some protection against powerful superiors. (*Prudential Ins. Co. vs. Cheek*, 259 U. S. 530, 535-537). On the contrary the effort of the State of New Mexico to compel foreign insurance companies to pay commissions, earned by agents in other states by obtaining business, to resident agents in New Mexico who countersign policies could directly benefit only the highest class of New Mexico agents, *i. e.*, those empowered to countersign for the company. If the dole, by which England is now so sorely vexed, can find any place under American constitutional government, it must at least take a

form more plausible than a "minimum wage" for insurance agents consisting of commissions they do not earn.

The unanimous opinions of this Court in the Kansas Industrial Court cases indicate that no member of this Court would altogether deny freedom of contract between employer and employee under the due process clause of the Fourteenth Amendment, however narrowly some members of the Court might restrict such freedom in industrial relations. A minimum "wage" law for insurance agents could be sustained only by denying all freedom of contract in fixing compensation for personal services. Whatever the views of individual members of this Court, the Court has decided that legislation fixing the wages of a twenty-one year old elevator girl in a hotel is an unconstitutional interference with freedom of contract. There is no possible justification for greater restriction of freedom in order to protect New Mexico insurance agents against their "employers" than to protect Washington elevator girls.

(*b*) As to insurance agents who are residents of other states, Section 2820 is (as is likewise Section 68 of the Act of 1925) not a minimum wage law—or a maximum wage law only—but a *prohibition* of all compensation. [In Section 68 "the full commission" evidently means the full *actual* commission paid and therefore precludes the payment of any commission at all to a non-resident agent for services outside the State in obtaining the business. If, however, "the full commission" could be construed as meaning the full *reasonable* or *usual* commission that should or would be paid if the resident agent had both *obtained* and written the business—a standard probably too vague to be consistent with due process (*United States vs. Cohen Gro-*

cery Co., 255 U. S. 81),—then Section 68 would still operate as a *prohibition* of compensation to non-residents for *obtaining* business written in New Mexico. Such compensation could be paid to non-residents only on condition that the same compensation be paid a *second* time to a New Mexico resident agent who did *not* earn it. This "is a prohibition to the extent of the payment required." (*St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 348.)

Even when *regulation* of a legitimate business is consistent with due process, it does not follow that *prohibition* is. Prohibition of compensation is prohibition of the business or occupation so far as those engaged in the business are concerned. (*Adams vs. Tanner*, 244 U. S. 590, 592-593.) In *Brazee vs. Michigan*, 241 U. S. 340, this Court held that employment agencies are subject to police regulation and control, saying:

> "The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them."
> 241 U. S. 343.

Nevertheless, in *Adams vs. Tanner*, 244 U. S. 590, this Court held unconstitutional a Washington employment agency law—Initiative Measure No. 8—which prohibited employment agents from receiving fees from the workers for whom they find places. In the course of its opinion, this Court said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no

> profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."
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> * * * * * *
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> "We are of opinion that initiative Measure Number 8 as construed by the Supreme Court of Washington is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business. It may not therefore be enforced against them."
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> 244 U. S. 594-595, 596-597.

Viewed either as a minimum "wage" law—fixing a minimum of one hundred per cent.—for New Mexico insurance agents or as a prohibitory law for insurance agents in other states, Section 2820 is (as is likewise Section 68 of the Act of 1925) an unconstitutional interference with the freedom of contract guaranteed by the due process clause of the Fourteenth Amendment. Thus, both as to its *territorial scope* and also as to its *subject matter*, it is contrary to the due process clause of the Fourteenth Amendment.

C.

Even if the State of New Mexico possessed BOTH of these powers which it DOES NOT possess, it could not (without denying the plaintiff the equal protection of the laws) EXERCISE these powers in such a way as (a) to PROHIBIT only payment of commissions to agents in other states for lawful services rendered in other states BY THEM, or (b) to REQUIRE payment of commissions to agents in New Mexico for services NOT RENDERED BY THEM.

The due process clause denies the *existence* of legislative power over certain subject matters, *e. g.*, (*a*) extra-territorial legislation, (*b*) wage-fixing legislation. The equal protection clause prohibits the arbitrary *exercise* of unquestioned legislative powers, *e. g.*, the sovereign power of taxation, the power to regulate the insurance business, and the power to control foreign corporations. In *Truax vs. Corrigan*, 257 U. S. 312, this Court differentiated between the due process clause and the equal protection clause and summarized the scope of the latter clause thus:

> "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitu-

tions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado vs. California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in

Barbier vs. Connolly, 113 U. S. 27, 32, of the equality clause, said— 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' In *Hayes vs. Missouri*, 120 U. S. 68, the court speaking through the same Justice said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or a property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

"Mr. Justice Matthews, in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

"'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*'

"The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It

> emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process."
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> 257 U. S. 331-334.

If there were no due process clause in the Fourteenth Amendment and the legislative power of the State of New Mexico were not otherwise territorially limited, the particular legislation involved in this case, viz., Section 2820 and Section 68, would be unconstitutional as achieving precisely the results the equal protection clause is designed to prevent. "Undue favor and individual or class privilege, on the one hand, * * * hostile discrimination * * * on the other," "class legislation discriminating against some and favoring others," are the direct and *only* purpose and effect of this legislation. The sole purpose and the inevitable effect of this legislation is arbitrary discrimination between New Mexico insurance agents and insurance agents in other States for the benefit of the former at the expense of the latter. This legislation is both a minimum and a maximum wage law,—a minimum wage law for New Mexico agents, fixing their compensation at one hundred per cent., a maximum wage law for residents of other states, fixing their compensation at zero, *i. e.*, prohibition. Except to the extent of thus discriminating against residents of other states, the compensation of New Mexico insurance agents is in fact not fixed or regulated at all, either by a "minimum wage" to protect the agents against the companies or by a "maximum wage" to protect the companies against the agents.

Nor is this discrimination between residents of New Mexico and residents of other states merely discrimination—sometimes permissible, sometimes not—between residents and *non-residents in New Mexico.* On the contrary it is discrimination between residents

of New Mexico in New Mexico and residents of other states in *their own states*. A resident of New Mexico may render services in his state and be paid for them. A resident of New York may render services in his state but may *not* be paid for them; on the contrary some resident of New Mexico *must* be paid for the services, rendered not by him but by the resident of New York. Section 2820 makes it plain that the resident of New York is forbidden, not to render services but only to receive compensation for them. It is unlawful for any foreign insurance company to "make, *write* [or] *place*" in New Mexico any insurance policy unless through its resident agent. It is unlawful for any insurance company authorized to do business in New Mexico to *pay* any emolument to any person not a resident of New Mexico for the "*obtaining, placing* or *writing*" of any policy of insurance. In short, *writing* and *placing* are forbidden to non-residents; *obtaining is not;* but *compensation for obtaining is.*

In *LaTourette vs. McMaster*, 248 U. S. 465, this Court held constitutional a South Carolina statute providing that only such persons may be licensed as brokers as are residents of the State and have been licensed insurance agents of the State for at least two years. In the course of its opinion, this Court said:

> "The pleadings and the action of the court indicate the question in the case and, it would seem, the elements of it, but they are not clearly segregated in the argument of counsel. They seem to be: (1) That La Tourette is deprived of his liberty and a property right by the act of the State in violation of the due process clause of the Fourteenth Amendment. (2) That the act discriminates against citizens of other States in favor of citizens of the State of South Carolina in violation of Section 2, Article IV, of the Constitution of the United States.

"(1) This contention depends upon the character of the business of insurance, and it was decided in *German Alliance Insurance Co. vs. Lewis*, 233 U. S. 389, to be clothed with a public interest and subject, therefore, to the regulating power of the State. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (*Hooper vs. California*, 155 U. S. 648, 657), and his fidelity to both may be the concern of the State to secure. As said by the Supreme Court of the State: 'It is important for the protection of the interests of the people of the State that the business should be in the hands of competent and trustworthy persons.' And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the Commissioner of Insurance. The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate.

* * * * * *

"(2) This contention, that is, that the act discriminates against citizens of other States and thereby offends the Constitution of the United States, is La Tourette's ultimate reliance, and to it his counsel devote their entire argument. The State replies its power over insurance and that the legislation it justifies extends to its agents and is best executed when they are residents of the State. This view we have sustained, and manifestly to declare the legislation illegal is to put a restraint upon a power that has practical justifications."

248 U. S. 467-468, 468-469.

This South Carolina statute did not operate extra-territorially. It regulated only the business of insurance brokers *in South Carolina*—by restricting the business to residents of South Carolina. Through this restriction (says this Court) the result of keeping the business "in the hands of competent and trustworthy persons" "can be more confidently and completely secured," resident brokers "being immediately under the inspection of the Commissioner of Insurance." (248 U. S. 468.)

Of course no such result can be attained at all through New Mexico legislation which attempts to regulate the insurance business in forty-seven other states. It is beyond the power of the State of New Mexico to protect in other states the interests of its citizens who may choose to make or negotiate insurance contracts in other states. Still less can it protect—it can only annoy—citizens of distant states who prefer to *negotiate* in their own states for insurance of their New Mexico property or employees to be *written* in New Mexico. This legislation does not bring insurance agents in other states "immediately"—or at all—"under the inspection of the Commissioner of Insurance." It does nothing to keep the business in other states "in the hands of competent and trustworthy persons." Its only aim is to divert commissions out of other states into New Mexico. The Act of 1925 actually authorizes *licensing* of non-resident brokers, *not to do business* in New Mexico—or anywhere else—but merely *to receive compensation* for business they are already authorized to do in other states. (Section 68, Appendix A, *infra*,). For this narrow permit to a non-resident broker to receive compensation for extra-territorial services, an annual fee of twenty dollars must be paid to the State of New

Mexico, *ten times* the fee for an annual license to a New Mexico insurance agent. (Section 27. Appendix A, *infra*, 101). This fee alone (not involved in this case) violates the equal protection clause.

In *Air-Way Corporation vs. Day*, 266 U. S. 71, this Court, speaking of an annual foreign corporation fee, said:

> "The fee determined by the lower Court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."
>
> 266 U. S. 83.

Speaking of the classification of foreign corporations for the purpose of determining the amount of such annual fees, this Court in the same case said:

> "Such a classification is not based on anything having relation to the purpose for which it is made. *Southern Ry. Co. vs. Greene*, 216 U. S. 400, 417; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. *Martin vs. District of Columbia*, 205 U. S. 135, 139; *Gast Realty Co. vs. Schneider Granite Co.*, 240 U. S. 55, 58; *Kansas City Southern Ry. Co. vs. Road Improvement District*, 256 U. S. 658, 660. The act violates the equal protection clause of the Fourteenth Amendment."
>
> 266 U. S. 85.

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in re-

spect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern Ry. Co. vs. Greene, 216 U. S. 480, 417.

The plaintiff does business in forty-eight states. Its agents in forty-seven states have a constitutional right to pursue their occupation, on terms satisfactory to the plaintiff and themselves, without interference from the State of New Mexico. The plaintiff has a constitutional right to employ these agents without interference from the State of New Mexico. The agents have an interest in the plaintiff's freedom to employ them, and plaintiff has an interest in their freedom to accept employment. (*Terrace vs. Thompson*, 263 U. S. 197, 216; *Pierce vs. Society of Sisters*, 268 U. S. , 45 Sup. Ct. 571, 573-574, decided June 1, 1925; *Truax vs. Raich*, 239 U. S. 33, 38-39).

Arbitrary discrimination between residents and non-residents (*Travis vs. Yale and Towne Mfg. Co.*, 252 U. S. 60, 78-79), or even between citizens and aliens (*Truax vs. Raich*, 239 U. S. 33, 39-42), and even when due to inadvertence rather than design (*Royster Guano Co. vs. Virginia*, 253 U. S. 412, 416), violates the equal protection clause.

In this case arbitrary discrimination is the sole purpose and the inevitable effect of the legislation in question. The legislation is aimed at what in the insurance business is loosely called "dividing commissions"—between those who earn them by obtaining business and those who do not earn them. The prescribed legislative basis of division is, none to those who earn, all to those who do not. The classification

between residents of New Mexico and residents of other states simply amounts to a classification between those who reap—what they do not sow—and those who sow. Residents of other states may sow; only residents of New Mexico may reap. This servitude in favor of its own citizens the State of New Mexico imposes on the residents of forty-seven other states.

"And the Sons of Mary smile and are blessed—* * *
They see how truly the Promise runs.
They have cast their burden upon the Lord, and—
The Lord, He lays it on Martha's Sons!"

Of course, if New Mexico can do this, forty-seven other states can do the same thing. This does not mitigate the wrong; it only aggravates it.

> "Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution."
>
> *Travis vs. Yale & Towne Mfg. Co.*, 252 U. S. 60, 82.

III.

LEGISLATION IN OTHER STATES.

The defendants' answer says that the New Mexico statutes involved in this case "are statutes of a familiar character enacted by many states of the Union" (R. 11), and "are each and all of them familiar laws enacted in substantially like form in many of the states of the United States, and that such statutes are obviously fair and valid legislation enacted in pursuance of the police power of the State of New Mexico and not in contravention of any provisions of the Con-

stitution of the United States" (R. 13). At the argument below the defendants relied largely on the fact that other states have adopted similar legislation.

The constitutional significance (if any) of comparative legislation depends upon the nature of the constitutional question at issue. When the question is whether the *subject matter* can be regulated by legislation or must be left entirely to the operation of freedom of contract, the fact that legislation has been adopted in other states at least "attests a widespread belief in the necessity for such legislation." (*Prudential Ins. Co. vs. Cheek*, 259 U. S. 530, 537). Even then statutes adopted elsewhere indicate the desirability and not the constitutional validity of such legislation:

> "These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads."
>
> *Adkins vs. Children's Hospital*, 261 U. S. 525, 559-560.

When the constitutional question is *not* whether the *subject matter* admits legislative regulation at all, but whether the particular legislation oversteps *territorial limitations* or *arbitrarily discriminates* in favor of local interests against residents of other states, then similar legislation elsewhere attests neither the constitutional validity nor the desirability of the legislation, but rather the extent and persistence of the very provincialism and local prejudice which constitutional limitations are designed to restrain.

Legislation in other states similar to that involved in the present case reflects just such a provincial spirit. For almost thirty years since the adverse decision of this Court in *Allgeyer vs. Louisiana*, 165 U. S. 578, and in spite of repeated decisions of this Court applying the principle of the *Allgeyer* case, this spirit has persisted in the effort to push state insurance legislation beyond state lines in order to discriminate in favor of local insurance agents and brokers against residents of other states *in their own states*. This Court has never sustained such insurance legislation "by counting heads."

In the *Allgeyer* case this Court twenty-eight years ago held unconstitutional a state statute which prohibited, by a fine, the making outside the state, by a resident of the state, of a contract of insurance on property within the state with an insurance company not authorized to do business in the state. The statute did not in terms mention contracts made outside the state, but covered all contracts insuring property within the state, and was construed by the state court as not excepting contracts made outside the state. The statute books of three states still contain legislation of the same kind. [Appendix B, *infra*, 114.]

Instead of discouraging similar legislation this decision apparently stimulated efforts to evade the decision. What could not be prohibited by "fine" was prohibited by "tax." This Court, however, held that this change of name made no difference.

> "The name given by the State to the imposition is not conclusive. *Child Labor Tax Case*, 259 U. S. 20; *Lipke vs. Lederer*, 259 U. S. 557. * * * Each is a prohibition to the extent of the payment required."
>
> *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 348.

The statute books of at least eleven states still contain such "tax" statutes, not including New Mexico (repealed in 1925). [Appendix B, *infra*, 117-118.]

"Resident Agent Laws," in so far as they prohibit insurance companies authorized to do business in the State from *making within the state* insurance contracts otherwise than through resident agents, are constitutionally valid. (*La Tourette vs. McMaster*, 248 U. S. 465.) Such laws are in force in forty-six states—all except New York and Indiana. [Appendix B, *infra*, 109-113.]

In forty out of these forty-six states, however, these very Resident Agent Laws prohibit not only contracts made within the state, but also contracts made outside the state. [Appendix B, *infra*, 114-117.] New Mexico is now one of these forty states. Section 68 of the Act of 1925 [Appendix A, *infra*, 106-108]—like the Louisiana statute held unconstitutional in the *Allgeyer* case—prohibits all contracts of insurance on any risk within the state, thus including contracts made outside the state as well as those made within the state. These Resident Agent Laws in these forty states, in so far as they prohibit contracts made outside the state, are clearly unconstitutional under the decisions of this Court in the *Allgeyer* case and in subsequent cases applying the principle of the *Allgeyer* case. A state can no more prohibit a foreign corporation authorized to do business in the state, than it can prohibit an individual resident of the state, from making a contract outside the state. (*N. Y. Life Ins. Co. vs. Head*, 234 U. S. 149; *N. Y. Life Ins. Co. vs. Dodge*, 246 U. S. 357; *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 349.) So clearly unconstitutional are these prohibitions of contracts made outside the state that, after repeated decisions of this Court and also of state courts (See

notes 1 A. L. R. 1665 and 32 A. L. R. 636), state officials—including those of New Mexico, the defendants in this case—no longer attempt to enforce statutes such as Section 68 as applied to contracts of insurance made outside the state.

Of the Resident Agent Laws which in forty-six states *constitutionally* prohibit *contracts* of *insurance made within the state*, and in forty states *unconstitutionally* purport to prohibit also *contracts* of *insurance made outside the state*, these laws in only twenty-seven states also purport—like Section 2820 and Section 68—to prohibit *contracts* of *employment*, *i. e.*, payment for services, *made outside the state*. Twenty-seven states is, of course, no small number to enact unconstitutional legislation. When, however, forty states have on their statute books unconstitutional legislation purporting to prohibit *contracts* of *insurance* made outside the state, it is not altogether surprising that in twenty-seven out of these forty states this unconstitutional legislation happens to contain a second unconstitutional feature, viz., a prohibition of *contracts* of *employment* made outside the state. At all events, when legislation adopted in forty states is clearly unconstitutional, the fact that in twenty-seven of these forty states this unconstitutional legislation contains an added feature does not tend to prove that in these twenty-seven states the branch is constitutionally more sound than the tree. On the contrary, the decisions of this Court establishing the unconstitutionality of Resident Agent Laws which prohibit *contracts* of *insurance* made outside the state lead irresistibly to the conclusion that the Resident Agent Laws which in twenty-seven of these states go still further and attempt to prohibit *contracts* of *em-*

ployment made outside the state are likewise unconstitutional.

The fact is that, relatively speaking, insurance laws are a storehouse of unconstitutional legislation. The development of this kind of insurance legislation, beginning within constitutional limitations but repeatedly overgrowing these limitations, is not unprecedented. The constitutional basis of legislation regulating professions and occupations by requiring qualifications of fitness, including sometimes residence, is "the protection of the interests of the people of the state" by keeping the business "in the hands of competent and trustworthy persons." (*LaTourette vs. McMaster*, 248 U. S. 465, 468.) An incidental result of such legislation is protection of those engaged in the profession or occupation from competition on the part of those excluded. To provincialism and narrow class spirit this field of legislation affords constant temptation to make the interests of the people a mere pretext and monopoly for those engaged in the occupation the real ulterior purpose. When legislative regulation of professions reaches the "profession" of horseshoeing the courts look through pretext to the real ulterior purpose of the statute and strike down the statute as unconstitutional interference with freedom of contract. (See cases cited in the opinion of this Court in *Lochner vs. New York*, 198 U. S. 45, 63.)

Legislative restriction of the business of insurance agents and brokers *in the state* to residents of the state is in the interest of the people of the state who do business with insurance agents and brokers. Incidentally such legislation benefits resident insurance agents and brokers by protecting them against itinerant competition. State legislation prohibiting payment of compensation to residents of other states for

services rendered outside the state, or requiring payment of compensation to residents of the state who have not rendered the services, is not legislation in the interest of the people of the state. It does not regulate at all, by exclusion or otherwise, the relations between the people of the state and insurance agents or brokers with whom they do business. It is simply class legislation in the interest of local insurance agents and brokers for the sole purpose and effect of diverting compensation for services rendered in other states from those who render the services to local agents who do not render them.

In this evolution from constitutional regulation of local insurance business in the interest of the local public to unconstitutional class legislation to divert unearned commissions into the pockets of local insurance agents the state has crossed the territorial limitations repeatedly enforced by this Court and concisely summarized thus:

> "It is true that the State may regulate the activities of foreign corporations within the State, but it cannot regulate or interfere with what they do outside."
>
> *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 349.

The decree in this case should be reversed with directions to grant the relief prayed in the bill.

Respectfully submitted,

C. J. ROBERTS,
CHARLES MARKELL,
Counsel for Appellant.

APPENDIX A.

Paragraphs 3 and 5 of the Bill of Complaint, citing New Mexico statutes (R. 1-3, 5); **and corresponding provisions of Chapter 135 of the New Mexico Laws of 1925.**

3. Section 1 of Article XI of the Constitution of the State of New Mexico provides:

> "A permanent commission to consist of three members is hereby created, which shall be known as the 'State Corporation Commission.'"

Section 6 of the same Article provides, among other things:

> "Subject to the provisions of this Constitution, and of such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters for domestic corporation and amendments or extensions thereof, and all licenses to foreign corporations to do business in this State; and through which shall be carried out all the provisions of this Constitution relating to corporations and the laws made in pursuance thereof * * *. All charters, papers and documents relating to corporations on file in the office of the secretary of the territory, the commissioner of insurance and all other territorial offices, shall be transferred to the office of the commission."

[Bill of Complaint.]

Section 2807 of the New Mexico Code of 1915 is a codification of part of an act passed some years prior to the adoption of the Constitution of the State of New Mexico. Sec-

[Act of 1925]

Chapter 135 of the New Mexico Laws of 1925, entitled "An Act relating to insurance and to codify the Insurance Laws of the State of New Mexico" (hereafter called the Act

tion 2807 provides, among other things:

"It shall be the duty of the superintendent of insurance * * * to issue certificates of authority to transact insurance business to any insurance companies which have fully complied with the laws of this State, and to issue such other certificates as required by law in the organization of insurance companies and the transaction of the business of insurance and generally to do and perform with justice and impartiality all such duties as are or may be imposed on him by the laws in relation to the business of insurance in this State; * * *."

of 1925), approved March 20, 1925, effective immediately (Sec. 77), is a codification of the New Mexico Insurance Laws.

Section 70 of the Act of 1925 provides, among other things:

"Upon the application of any insurance company for a license to transact an insurance business in the State of New Mexico, the Superintendent shall immediately satisfy himself that the said company * * * has * * * complied with all the * * * requirements of this Act, and shall thereupon be obligated to issue a license to the said company authorizing it to transact the forms of insurance permitted under its articles of incorporation and authorized under this Act for any one insurance company to transact."

Section 2 provides:

"That a Department of Insurance is hereby created, within the Corporation Commission, the chief officer of which shall be known as the Superintendent of Insurance, and who shall be charged with the execution of the laws relating to insurance."

[Bill of Complaint.]

Section 2814 of the New Mexico Code of 1915 provides, among other things:

"No company shall transact in this State any insurance business unless it shall procure from the Superintendent of Insurance a certificate stating that the requirements of the laws of this State have been complied with, and authorizing it to do business. Said certificate shall expire on the last day of February in each year, and must be renewed annually. Every such company shall be required to procure annually for the use of its agents and solicitors copies of such certificate of authority, and any person soliciting business or any company authorized to transact business in this State without first procuring a certificate from the superintendent of insurance, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of one hundred dollars for each and every offence. * * * ."

[Act of 1925]

Section 27 provides, among other things:

" * * * Every insurance company licensed to transact an insurance business in the State of New Mexico shall pay to the superintendent the following taxes and fees:

* * * * *

For Annual License to transact business	$50.00
For each Annual License issued to Agents	2.00

* * * * *

For each Annual License issued to Non-Resident Brokers	20.00

* * * ."

Section 33 provides, among other things:

"Each insurance company licensed to transact business in the State of New Mexico shall, on or before the first day of March in each year, certify to the superintendent the names and addresses of all persons in the State of New Mexico employed by it or authorized by it as its agent to solicit insurance or transact an insurance business in the name of

said company, and shall apply and pay for an annual license in the name of each person included in said list, and whenever said company shall employ any new person to represent it as agent in the State of New Mexico it shall immediately notify the superintendent in writing, and apply for a license for said person; * * * and no company licensed to transact an insurance business in the State of New Mexico shall permit any agent in the State of New Mexico employed by it to transact an insurance business until the foregoing conditions have been complied with, and the superintendent has issued and delivered the said license to the company.

"Licenses issued to such agents shall continue until the first day of the next March, unless previously canceled by the company by certificate filed with the superintendent, and expiring agents' licenses may be renewed in like manner to continue until the first day of the next March; * * *."

[Bill of Complaint.]

[Act of 1925]

Section 72 provides, among other things:

"Every company shall, as a prerequisite to the issuance of a renewal of its license, on or before the first day of March of each year, file with the superintendent a financial statement for the year ending December 31st immediately preceding, * *."

Section 11 provides:

"Any person, partnership or corporation transacting any business of insurance in the State of New Mexico without having first received a license to transact such business, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not to exceed $500.00."

Section 2815 of the New Mexico Code of 1915 provides, among other things, that an insurance company not incorporated or organized under the law of New Mexico shall, before permission is given to transact business and before the renewal of its certificate of authority, file a certificate signed by its president or chief offi-

Section 13 provides:

"No insurance company shall be licensed, and no licenses shall be granted, unless and until the said licensee shall have accepted in writing as a consideration of the license all of the laws of the State of New Mexico."

cer to the effect that all the provisions of Chapter LVIII (relating to insurance) of said Code are accepted by it as a part of the conditions of its right and authority to transact business in New Mexico.

Section 2861 of the New Mexico Code of 1915 provides:

"It shall be the duty of the Superintendent of Insurance to revoke the authority to do business in this State of any corporation, firm or association, violating or failing to comply with any of the provisions of this chapter, or any of whose agents fail to comply with or violate any of the provisions of this chapter. And no such corporation, firm or association shall be authorized to write any insurance in this State for the period of one year after such revocation."

Section 71 provides, among other things:

"In the event that the superintendent is satisfied that any insurance company licensed to transact business in the State of New Mexico is wilfully not complying with all of the laws of the State of New Mexico relating to insurance, * * * it shall be the duty of the superintendent to cancel the license of said company, provided that the superintendent shall give the said company twenty days' notice in writing of his intention to do so, and that the said company shall have the right to appeal to the Corporation Commission from the decision of the Superintendent, and that in the event of such an appeal being filed the Corporation Commission shall immediately conduct a hearing as to the merits of the super-

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intendent's decision, and either confirm the cancellation of the license, or withdraw the notice of cancellation issued by the superintendent."

Each of the sections hereinbefore mentioned, and also Section 2820 hereinafter mentioned, of the New Mexico Code of 1915 are part of Chapter LVIII thereof entitled "Insurance."

Section 22 of Chapter 56 of the New Mexico Laws of 1917 provides:

"The State Corporation Commission shall have control and supervision of the State Bank Examiner and the records and files of his office."

Section 10 provides:

"Any company or person affected may, upon written notice to the superintendent, appeal in writing to the Corporation Commission from any decision, order, requirement, or action or refusal to act of the superintendent. The Corporation Commission may affirm, vacate, or modify the order or action of the superintendent. Such right of appeal to the Corporation Commission shall not affect the right of any such company or person to prosecute any proper proceeding in the courts for relief from any such decision, order, action or refusal to act of the super-

[Bill of Complaint.]

Section 2 of Chapter 47 of the New Mexico Laws of 1921 provides:

"That all the powers and duties prescribed by law and vesting in or resting upon the Insurance Department of the State of New Mexico and the Superintendent thereof shall be forthwith vested in and performed by the State Bank Examiner of the State of New Mexico."

5. Section 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the New Mexico Laws of 1921, provides:

"It shall be unlawful for any foreign insurance company to make, write, place or cause to be made, written or placed in this State, any insurance policy or contract of any kind to provide against any contingency which may be insured or guaranteed against, unless the same shall be made, written or placed through its duly and regularly appointed

[Act of 1925]

intendent or decision of the Corporation Commission."

Section 3 provides, among other things:

"That all of the powers relating to insurance matters and collection of insurance licenses, taxes or fees now held by the Bank Examiner and Deputy for Insurance, and all records pertaining to insurance now held in the office of the Bank Examiner, be and are transferred to the Corporation Commission, * * *."

5. Section 68 provides:

"No company licensed to transact an insurance business in the State of New Mexico shall issue any contract of insurance or indemnity assuming liability on any risk or hazard in the State of New Mexico unless said contract is written, signed and delivered, and the premium collected by and the full commission retained thereon by one of its duly appointed agents licensed in the State of New Mexico. Provided, however, that any such

and authorized agent or agents, resident of this State. It shall be unlawful for any insurance company authorized to do business in New Mexico, its representative, manager, general agent, special agent, local agent, broker or solicitor, to pay or promise to pay, either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this section shall have its certificate of authority to do business in this State suspended for not less than one year, and such suspension shall be removed and the said certificate of authority renewed only upon a written pledge from the directors or executive body in authority over the officers of such company that this section will be fully and faithfully observed."

agents may authorize a licensed non-resident broker to collect the premium thereon and perform any other service required in connection therewith, and pay the said licensed non-resident broker not to exceed two-thirds of the full commission received by him from the insurance company he represents; and Further Provided, that any licensed agent of any insurance company may pay to any other licensed agent of any insurance company for services rendered any part of any commission received by him from any insurance company he is licensed in New Mexico to represent.

"Provided, that this Section shall not apply to direct insurance covering the rolling stock and other property belonging to and used in the operation and maintenance of plant and business of railroad corporations, or other common carriers, or property in transit while in the possession or custody of railroad corporations, or other common carriers; nor to direct insurance

covering the property belonging to and used in the operation and maintenance of the plant and business of telephone and telegraph companies.

"Provided, that this Section shall not apply to life insurance companies.

"Any company, agent, or non-resident broker violating in any way the spirit or intent of this Section shall immediately have its or his license suspended."

APPENDIX B.

List of Statutes.

(1) Prohibiting the *making within the state* of insurance contracts by authorized insurance companies, except through resident agents. (*La Tourette vs. McMaster*, 248 U. S. 465.) [Constitutional.]

(2) Prohibitinng the *making of contracts* of insurance *on risks within the state*, including (by not excepting or by expressly mentioning) contracts *made outside the state*, (*a*) by residents of the state with unauthorized foreign insurance companies (*Allgeyer vs. Louisiana*, 165 U. S. 578), or (*b*) by authorized foreign insurance companies (*N. Y. Life Insurance Co. vs. Head*, 234 U. S. 149; *N. Y. Life Insurance Co. vs. Dodge*, 246 U. S. 357; *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 349), except through resident agents. [Unconstitutional.]

(3) *Taxing* the making outside the state of contracts of insurance on risks within the state by residents of the state. (*St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346.) [Unconstitutional.]

(4) Prohibiting the *payment outside the state* by authorized foreign insurance companies of *compensation* to residents of other states for *services rendered outside the state* in *obtaining outside the state* business *written within the state*. [This case.]

(1)

Statutes prohibiting the *making within the state* of insurance contracts by authorized insurance companies, except through resident agents.

Alabama: Code of Alabama, (1923), Sections 8353, 8379.

Arizona: Revised Statutes of Arizona, (1913), Civil Code, Section 3409, as amended by Laws of 1915, Regular Session, Chapter 58, Section 2.

Arkansas: Acts of 1921, Act 493, Section 11.

California: Political Code, (1923), Section 633d, added by Statutes of 1923, Chapter 354, page 728.

Colorado: Compiled Laws of Colorado, (1921), Sections 2510, 2535.

Connecticut: General Statutes of Connecticut, (1918), Sections 4106, 4290.

Delaware: Revised Code of Delaware, (1915), [Section] 582, as amended by Laws of 1921, Chapter 43.

Florida: Revised General Statutes of Florida, (1920), Section 4267.
Laws of 1921, Chapter 9152, Section 1.

Georgia: Park's Annotated Code of Georgia, (1914), Section 2491.

Idaho: Compiled Statutes of Idaho, (1919), Sections 5008, 5009.

Illinois: Smith-Hurd Revised Statutes of Illinois, (1923), Chapter 73, Section 63.

Iowa: Code of Iowa, (1924), Section 8972.

Kansas: Revised Statutes of Kansas, (1923), Chapter 40, Section 405.

Kentucky: Carroll's Kentucky Statutes, (1922), Section 762a-20.

Louisiana: Wolff's Constitution and Statutes of Louisiana, (1920), page 938, Laws of 1898, Act 105, Article III, Section 7, as amended by Laws of 1900, Act 144.

Same, page 1005, Laws of 1918, Act 153, Section 1.

Same, page 1008, Laws of 1902, Act 167, Section 1.

Maine: Revised Statutes of Maine, (1916), page 875, Section 105.

Maryland: Annotated Code of Maryland, (1924), Article 48A, Section 65.

Massachusetts: General Laws of Massachusetts, (1921), Volume II, Chapter 175, Section 157.

Michigan: Cahill's Compiled Laws of Michigan, (1922), Section 9100 (119).

Minnesota: General Statutes of Minnesota, (1923), Section 3720.

Mississippi: Hemingway's Annotated Code of Mississippi, (1917), Volume II, Sections 5119, 5147.

Missouri: Revised Statutes of Missouri, (1919), Section 6315.

Montana: Revised Codes of Montana, (1921), Section 6164.

Nebraska: Compiled Statutes of Nebraska, (1922), Section 7788.

Nevada: Revised Laws of Nevada, (1919), Section 1304.

New Hampshire: Public Statutes and Session Laws of New Hampshire, Supplement (1901-1913), page 401, Laws of 1911, Chapter 180, Section 1, amending Laws of 1899, Chapter 86, Section 1.

New Jersey: Laws of 1921, Chapter 188, page 504, amending Laws of 1902, Chapter 134, Section 80.

New Mexico: New Mexico Code of 1915, Section 2820, as amended by Laws of 1921, Chapter 195.
[Repealed but reenacted with changes, Laws of 1925, Chapter 135, Sections 68, 76.]

North Carolina: Consolidated Statutes of North Carolina, (1919), Sections 6381, 6428.
Supplement, (1924), Section 6302, as amended by Laws of 1921, Chapter 136.

North Dakota: Compiled Laws of North Dakota, (1913), Sections 4926, 4961.

Ohio: General Code of Ohio, (1921), Section 5438.

Oklahoma: Compiled Oklahoma Statutes, (1921), Sections 6695, 6751.

Oregon: Oregon Laws, (1920), Sections 6333, 6388.

Pennsylvania: Supplement to Pennsylvania Statute Law, (1924), Section 12490b-501, Act of May 17, 1921, P. L. 682, Article V, Section 501.

Rhode Island: General Laws of Rhode Island, (1923), Section 3778.

South Carolina: Code of Laws of South Carolina, (1922), Sections 4072, 4090.

South Dakota: South Dakota Revised Code, (1919), Section 9186.

Tennessee: Thompson's Shannon's Code of Tennessee, (1917), Section 3348-a (3).
Public Acts of 1919, Chapter 163, Page 617.

Texas: Complete Texas Statutes, (1920), Section 4963.

Utah: Compiled Laws of Utah, (1917), Section 1152.

Vermont: General Laws of Vermont, (1917), Sections 5566, 5617.

Virginia: Code of Virginia, (1919), Section 4222.

Washington: Remington's Compiled Statutes of Washington, (1922), Section 7080.

West Virginia: Barnes' West Virginia Code, (1923), Chapter 34, Sections 36, 60a (1), pages 613, 619.

Wisconsin: Wisconsin Statutes, (1923), Section 201.44.

Wyoming: Wyoming Compiled Statutes Annotated, (1920), Sections 5288, 5289.
Laws of 1921, Chapter 142, Section 3.

(2)

Statutes prohibiting the making of contracts of insurance on risks within the state, including (by not excepting or by expressly mentioning) contracts made

outside the state (a) by residents of the state with unauthorized foreign insurance companies, or (b) by authorized foreign insurance companies, except through resident agents.

(*a*)

Louisiana: Wolff's Constitution and Statutes of Louisiana, (1920), page 985, Laws of 1894, Act 66. [Held unconstitutional in *Allgeyer vs. Louisiana*, 165 U. S. 578.]

Oregon: Oregon Laws, (1920), Section 6333.

West Virginia: Barnes' West Virginia Code, (1923), Chapter 34, Section 60a (1), page 619.

(*b*)

Alabama: Code of Alabama, (1923), Sections 8353, 8379.

California: Political Code, (1923), Section 633d, added by Statutes of 1923, Chapter 354, page 728.

Colorado: Compiled Laws of Colorado, (1921), Section 2535.

Connecticut: General Statutes of Connecticut, (1918), Sections 4106, 4290.

Delaware: Revised Code of Delaware, (1915), [Section] 640; [Section] 582, as amended by Laws of 1921, Chapter 43.

Florida: Revised General Statutes of Florida, (1920), Section 4267.
Laws of 1921, Chapter 9152, Section 1.

Georgia: Park's Annotated Code of Georgia, (1914), Section 2491.

Idaho: Compiled Statutes of Idaho, (1919), Section 5008.

Illinois: Smith-Hurd Revised Statutes of Illinois, (1923), Chapter 73, Section 63.

Iowa: Code of Iowa, (1924), Section 8972.

Kansas: Revised Statutes of Kansas, (1923), Chapted 40, Section 405.

Kentucky: Carroll's Kentucky Statutes, (1922), Section 762a-20.

Louisiana: Wolff's Constitution and Statutes of Louisiana, (1920), page 938, Laws of 1898, Act 105, Article III, Section 7, as amended by Laws of 1900, Act 144.

Same, page 1005, Laws of 1918, Act 153, Section 1.

Same, page 1008, Laws of 1902, Act 167, Section 1.

Maryland: Annotated Code of Maryland, (1924), Article 48A, Section 65.

Massachusetts: General Laws of Massachusetts, (1921), Volume II, Chapter 175, Section 157.

Michigan: Cahill's Compiled Laws of Michigan, (1922), Section 9100 (119).

Minnesota: General Statutes of Minnesota, (1923), Section 3720.

Mississippi: Hemingway's Annotated Code of Mississippi, (1917), Volume II, Sections 5119, 5147.

Missouri: Revised Statutes of Missouri, (1919), Section 6315.

Montana: Revised Codes of Montana, (1921), Section 6164.

Nebraska: Compiled Statutes of Nebraska, (1922), Section 7788.

Nevada: Revised Laws of Nevada, (1919), Section 1304.

New Hampshire: Public Statutes and Session Laws of New Hampshire, Supplement, (1901-1913), page 401, Laws of 1911, Chapter 180, Section 1, amending Laws of 1899, Chapter 86, Section 1.

New Mexico: Laws of 1925, Chapter 135, Section 68.

North Carolina: Consolidated Statutes of North Carolina, (1919), Sections 6428, 6429.

North Dakota: Compiled Laws of North Dakota, (1913), Section 4961.

Ohio: General Code of Ohio, (1921), Section 5438.

Oklahoma: Compiled Oklahoma Statutes, (1921), Section 6695.

Oregon: Oregon Laws, (1920), Sections 6333, 6388.

Pennsylvania: Supplement to Pennsylvania Statute Law, (1924), Section 12490b-501, Act of May 17, 1921, P. L. 682, Article V, Section 501.

South Carolina: Code of Laws of South Carolina, (1922), Sections 4072, 4090.

South Dakota: South Dakota Revised Code, (1919), Section 9186.

Tennessee: Thompson's Shannon's Code of Tennessee, (1917), Section 3348 a (3).
Public Acts of 1919, Chapter 163, page 617.

Texas: Complete Texas Statutes, (1920), Section 4963.

Utah: Compiled Laws of Utah, (1917), Section 1152.

Vemont: General Laws of Vermont, (1917), Sections 5566, 5617.

Virgina: Code of Virginia, (1919), Section 4222.

Washington: Remington's Compiled Statutes of Washington, (1922), Section 7080.

West Virginia: Barnes' West Virginia Code, (1923), Chapter 34, Sections 36, 60 a (1), pages 613, 619.

Wyoming: Laws of 1921, Chapter 142, Section 3.

(3)

Statutes *taxing* the making outside the state of contracts of insurance on risks within the state by residents of the state.

Alabama: Code of Alabama, (1923), Section 8373.

Arizona: Revised Statutes of Arizona, (1913), Civil Code, Section 3420.

Arkansas: Crawford & Moses, Digest of Statutes of Arkansas, (1921), Section 9967. [Held unconstitutional in *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346.]

Idaho: Compiled Statutes of Idaho, (1919), Section 5055. [Held unconstitutional in *Hyatt vs. Blackwell Lumber Co.*, 31 Idaho 452, 1 A. L. R 1663.]

Maryland: Annotated Code of Maryland, (1924), Article 48A, Section 74.

Minnesota: General Statutes of Minnesota, (1923), Section 3722.

New Mexico: Laws of 1921, Chapter 194, Section 6. [Repealed, Laws of 1925, Chapter 135, Section 76.]

North Carolina: Consolidated Statutes of North Carolina, (1919), Section 6427.

Ohio: General Code of Ohio (1921), Section 664-1.

Oklahoma: Compiled Oklahoma Statutes, (1921), Section 6751.

Pennsylvania: Pennsylvania Statute Law, (1920), Section 12457, Act of July 6, 1917, P. L. 723, Section 1.

Vermont: Laws of 1919, Act 43, page 48. [Held unconstitutional in *State vs. International Paper Co.*, 96 Vermont 506, 32 A. L. R. 632.]

(4)

Statutes prohibiting the *payment outside the state* by authorized foreign insurance companies of *compen-*

sation to residents of other states for *services rendered outside the state* in *obtaining outside the state* business *written within the state.*

Arizona: Revised Statutes of Arizona, (1913), Civil Code, Section 3409, as amended by Laws of 1915, Regular Session, Chapter 58, Section 2.

Arkansas: Crawford & Moses, Digest of Statutes of Arkansas, (1921), Section 6128.

California: Political Code, (1923), Section 633d, added by Statutes of 1923, Chapter 354, page 728.

Colorado: Compiled Laws of Colorado, (1921), Section 2535.

Delaware: Revised Code of Delaware, (1915), [Section] 582, as amended by Laws of 1921, Chapter 43.

Florida: Revised General Statutes of Florida, (1920), Sections 4258, 4267.
Laws of 1921, Chapter 9152, Section 1.

Idaho: Compiled Statutes of Idaho, (1919), Section 5009.

Louisiana: Wolff's Constitution and Statutes of Louisiana, (1920), page 1005, Laws of 1918, Act 153, Section 1.
Same, page 1008, Laws of 1902, Act 167, Section 2.

Maryland: Annotated Code of Maryland, (1924), Article 48A, Section 65.

Michigan: Cahill's Compiled Laws of Michigan, (1922), Section 9100 (87).

Mississippi: Hemingway's Annotated Code of Mississippi, (1917), Volume II, Section 5147.

Montana: Revised Codes of Montana, (1921), Section 6164.

Nevada: Revised Laws of Nevada, (1919), Section 1304.

New Hampshire: Public Statutes and Session Laws of New Hampshire, Supplement, (1901-1913), page 400, Laws of 1909, Chapter 85, Section 1.

New Mexico: New Code of 1915, Section 2820, as amended by Laws of 1921, Chapter 195.
[Repealed but reenacted with changes, Laws of 1925, Chapter 135, Sections 68, 76.]

North Carolina: Consolidated Statutes of North Carolina, (1919), Section 6430.
Supplement, (1924), Section 6302, as amended by Laws of 1921, Chapter 136.

North Dakota: Compiled Laws of North Dakota, (1913), Section 4961.

Oklahoma: Compiled Oklahoma Statutes, (1921), Section 6751.

Pennsylvania: Supplement to Pennsylvania Statute Law, (1924), Section 12490b-501, Act of May 17, 1921, P. L. 682, Article V, Section 501.

South Carolina: Code of Laws of South Carolina, (1922), Sectons 4072, 4090.

Tennessee: Thompson's Shannon's Code of Tennessee, (1917), Section 3348-a(3).
Public Acts of 1919, Chapter 163, page 617.

Texas: Complete Texas Statutes, (1920), Section 4965.

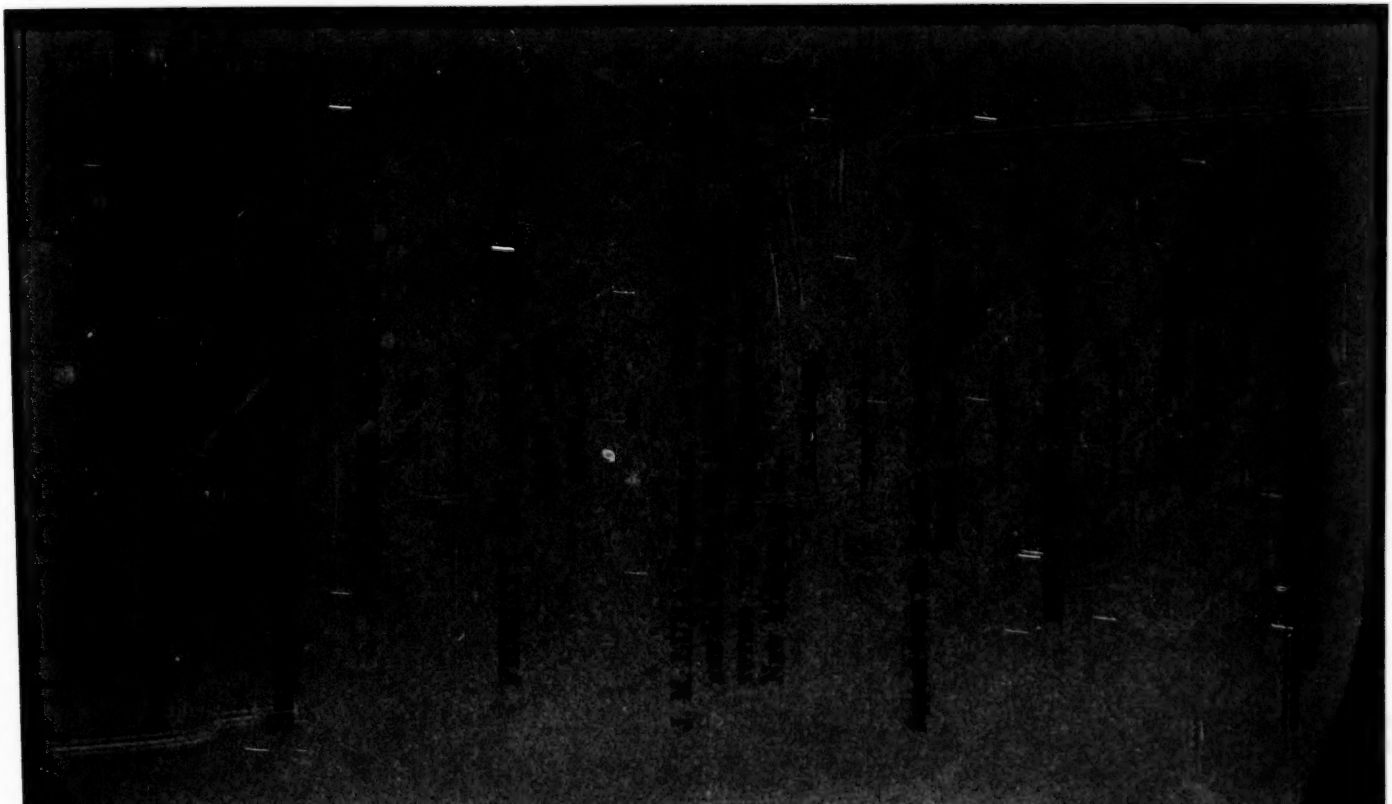
Utah: Compiled Laws of Utah, (1917), Section 1152.

Washington: Remington's Compiled Statutes of Washington, (1922), Section 7080.

West Virginia: Barnes' West Virginia Code, (1923), Chapter 34, Sections 53a, 60 a (1), pages 617, 619.

Wisconsin: Wisconsin Statutes, (1923), Section 207.01(e).

Wyoming: Laws of 1921, Chapter 142, Section 3.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925,

No. 88.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
APPELLANT,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.,
APPELLEES.

Appeal from the District Court of the United States for the District of New Mexico.

REPLY BRIEF FOR APPELLANT.

In view of the length of the appellant's brief as compared with the extreme brevity of the appellees', argument manifestly must not be indefinitely prolonged or repeated. This reply will be confined to (1) the surprising position taken in the appellees' brief

and (2) certain decisions not yet reported, most of them by three-judge federal courts, of course not controlling here but proper to be brought to this Court's notice.

(1) The appellees' position in their brief is at variance with their acts in the Record, and is a virtual admission that the legislation in question, as actually applied by them, is unconstitutional and that the decree must be reversed.

The appellees say (Brief, 10):

> "If the state possesses the power to insist upon a resident agent it likewise possesses the power to make sure that he be a bona fide agent and not a mere dummy or pretended agent. Probably the statutes in question do nothing more than define a bona fide resident agent, *i. e.*,—one who receives the commissions on business placed in the state. This requirement is not for the economic advantage of the agent but for the benefit of the public."

If this be the purpose of the statutes, the means are not only unconstitutional but are opposed to the end. What *is* a "dummy agent" if not one who receives commissions he does not earn? The *bona fides* of an agent is not assured by a requirement that he be paid what somebody else earns. To keep the business "in the hands of competent and trustworthy persons" resident agents, "they being immediately under the inspection of the Commissioner of Insurance," are "appropriate means." (*La Tourette vs. McMaster*, 248 U. S. 465, 468.) If the inspection of the New Mexico insurance department is inadequate, doles to "dummy agents" will not cure the inadequacy.

The appellees in the concluding paragraph of their brief (p. 12) state their position thus:

> "Appellant seeks to divide the act of placing a bond or policy into *solicitation* and *execution*, and

argues that the solicitation if done outside of the state must be paid out of the usual commission. The state recognizes no such segregation and is concerned only with the placing of the policy no matter what separate services or acts precede it. Any employee 'soliciting' New Mexico business outside the state doubtless performs valuable services for the company which the State of New Mexico has no objection to the company compensating. The entire overhead of the company including the services of the president and the efforts of the janitor of the home office likewise contribute in some measure to the placing of the policy in New Mexico. But neither the solicitor nor the president nor the janitor can claim any vested right to participate in the commission which New Mexico insists must go to the resident agent. And whenever services are performed by any outsider they are performed with notice that the resident agent who executes the policy must receive the commission and that the outsider must look to the remainder of the premium for his compensation. The State of New Mexico must insist upon a real resident agent,—a solicitor in Colorado will not do."

Appellant does not argue that anything or anybody anywhere "must be paid out of the usual commission." There is no "usual commission" in the case. "Usual commission" is not mentioned in the statutes or in the Record. Appellant is threatened with expulsion from New Mexico, not because solicitation oustide New Mexico is paid "out of the usual commission" but because *any commissions at all* are paid to agents outside New Mexico for services outside New Mexico. (Bill, pars. 6, 9, R. 4-5, 6; Answer, pars. VI, IX, R. 12. Letter from appellant to State Corporation Commission, December 13, 1923, and action of Commission, R. 22-23. Findings in final decree of District Court, R. 15.)

Section 2820 [Act of 1921] unqualifiedly prohibits payment of any "emolument of any nature" to any person not a resident of New Mexico for the obtaining of any insurance covering risks in New Mexico. This prohibition is broad enough to include the president of the company and the "janitor of the home office." This last point however is immaterial, since appellant is not actually threatened with expulsion because it pays its president and its janitor but because it pays its *agents* outside New Mexico. (Bill, par. 9, R. 6.)

Section 68 [Act of 1925] requires that "the full commission" be retained by a New Mexico agent. Both the context, (*e. g.*, the provisos in Section 68), and the antecedent legislation, (viz., Section 2820), thereby substantially re-enacted indicate that "the full commission" means the full *actual* commission paid, whether for *writing* insurance in New Mexico or for *obtaining* it outside New Mexico.

Section 68 thus prohibits payment of *any commission at all* to a non-resident agent for services outside the state in obtaining the business. If, however, "the full commission" could be construed as meaning "the full *usual* commission" paid for both (1) *obtaining* and (2) *writing* business, then Section 68 would still operate as a *prohibition* of compensation to non-residents for *obtaining* business written in New Mexico, since such compensation could be paid only on condition that the same compensation be paid a *second* time to a New Mexico resident agent who did *not* earn it. This "is a prohibition to the extent of the payment required." (*St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 348. Appellant's Brief, 80-81.) If "the full commission" could be construed as meaning only "the full *usual* commission" paid for *writing* business *alone* but *not obtaining* it, then this requirement of Section 68 would be meaningless but would not be violated by

appellant. Appellant of course pays its New Mexico resident agents the "usual commission" (so far as any particular commission is "usual") for *writing* business, but not the "usual commission" for both *writing* and *obtaining* business when the business is actually *obtained* through agents outside New Mexico.

However the New Mexico legislation be construed, the appellees' *acts* are *unconstitutional*. Construed (as the appellees construed and applied it) as authorizing these acts, the *legislation* is *unconstitutional*. The legislation otherwise construed, the *acts* are *unauthorized*. In either event, the decree should be reversed and the *acts enjoined*. The appellees' construction was approved by the Court below (R. 15). Recodification of this legislation without material change in the Act of 1925, since the decision below in this case, amounts to implied legislative approval of this uniform executive (*National Lead Co. vs. United States*, 252 U. S. 140, 146) and judicial (*Hecht vs. Malley*, 265 U. S. 144, 153) construction. To escape thus construing it as unconstitutional, it would need be construed as meaningless. In the face of this uniform executive, judicial and legislative construction, this Court cannot be expected to go so far in quest of a new and strained construction to save constitutionality.

(2) Recent unreported cases.

On the authority of at least four cases (three comparatively recent) in this Court the statement is made in appellant's original brief (pp. 47, 95-96, 109) that a state can no more prohibit a foreign corporation authorized to do business in the state, than it can prohibit an individual resident of the state, from making a contract outside the state. (*N. Y. Life Ins. Co. vs. Head*, 234 U. S. 149; *N. Y. Life Ins. Co. vs. Dodge*,

246 U. S. 357; *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346; all applying the principle of *Allgeyer vs. Louisiana*, 165 U. S. 578; see also *Aetna Life Insurance Co. vs. Dunken*, 266 U. S. 389; opinions quoted at length, Appellant's Brief, 60-70.) Accordingly Resident Agent Laws, in so far as they prohibit *contracts of insurance made outside* the state *on risks within* the state, are unconstitutional—so clearly so that state officials (including those of New Mexico, the appellees in this case) no longer attempt to enforce such statutes as so applied. Not so—it now appears—in Ohio.

(*a*) Without referring to any of these cases or citing any authority whatever the federal court for southern Ohio (CIRCUIT JUDGE DONAHUE and DISTRICT JUDGES WESTENHAVER and HOUGH) in *Palmetto Fire Insurance Co. vs. Conn, Superintendent of Insurance*, (decided October 20, 1925), held the contrary. The Palmetto Company made an "open contract of insurance" with the Chrysler Company to cover all Chrysler automobiles when sold by dealers to ultimate purchasers, including cars so sold and owned in Ohio. The contract of insurance (as the insurance company claimed and the court apparently assumed) was a Michigan contract, lawfully made in Detroit. The insurance company was authorized to do business in Ohio. The court held that the Ohio Resident Agent Law (1) prohibits an insurance company authorized to do business in Ohio from making in Michigan a contract of insurance on risks in Ohio and (2) is a valid provision with which an insurance company must comply in order to do business in Ohio. Accordingly the Court dismissed the bill for injunction to prevent the insurance commissioner from revoking plaintiff's license. ***An appeal to this Court has already been entered.***

The court, not denying that the contract of insurance was a Michigan contract, said:

> "However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing or causing to be written or placed, insurance upon property situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record.
>
> "While this Section is in furtherance of the state's taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio. * * *
>
> "This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases or from whom he pleases, nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the statute. In other words, it may not accept the benefits of the right and privilege of doing an insurance business in Ohio, and reject the conditions imposed by the statute."
>
> [Opinion printed in full as Appendix C of this brief, *infra* 14-19.]

This reasoning is simply the exploded doctrine of the *Doyle* [94 U. S. 535] and *Prewitt* [202 U. S. 246] cases, (overruled by the long line of cases from *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, to *Terral vs. Burke Construction Co.*, 257 U. S. 529), that *any* regulation at all, however *unconstitutional*, becomes valid as a *condition* of a foreign corporation's right to do business. Without repeating the argument and

review of authorities against this exploded doctrine (Appellant's Brief, 27-45) it will suffice to repeat only the reply of this Court to similar reasoning in a similar effort to escape the general rule of the *Allgeyer* case [165 U. S. 578] under the guise of conditions imposed on foreign corporations. This Court, by CHIEF JUSTICE WHITE, said:

> "But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condtion of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority."
>
> *N. Y. Life Ins. Co. vs. Head*, 234 U. S. 149, 163-164.

(*b*) More recently the federal court for southern New York (CIRCUIT JUDGE ROGERS and DISTRICT JUDGES AUGUSTUS HAND and KNOX) in *Palmetto Fire Insurance Company vs. Beha, Superintendent of Insurance*, (decided November 10, 1925), restrained by injunction the revocation of the insurance company's New York license on account of the making of the same Michigan contract of insurance with the Chrysler Company. The New York statute authorizes such revocation "whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state." The court, in its opinion by JUDGE ROGERS, distinguishes the *Conn* case on the obvious ground that New York, unlike Ohio, has no Resident Agent Law. This made it unnecessary *in terms* to approve or disapprove the opinion in the *Conn* case. In effect, however, JUDGE ROGERS' careful opinion, with full citation of authorities, state as well as federal, is in accord with the decisions of this Court and in conflict with the *Conn* case. After quoting and distinguishing the *Conn* case JUDGE ROGERS says:

> "The State of New York cannot by its statutes control or impair transactions which are extraterritorial. In *Allgeyer vs. Louisiana*, 165 U. S. 578, the Supreme Court had before it a statute enacted by the Legislature of Louisiana which subjected to fine any person or firm who should fill out, sign or issue in the State of Louisiana any certificate of insurance under an open marine policy, or who in any matter whatsoever should do any act in the state to effect for himself or for another, insurance on property then in the state, in any marine insurance company which had not complied with the laws of the State. The Court held the statute unconstitutional.
>
> A policy is not invalid which is issued in the State of Michigan to a citizen of New York upon property in the latter State. See *Baker vs. Spauld-*

ing, 71 Vt. 169; *Pennypacker vs. Capital Insurance Company*, 80 Iowa 86; *Phoenix Insurance Co. vs. Pennsylvania Ins. Co.*, 134 Ind. 215; *Strampe vs. Farmers Mutual Insurance Co.*, 109 Minn. 364; *Clay Fire and Marine Ins. Co. vs. Huron Salt and Lumber Mfg. Co.*, 31 Mich. 346; *Columbia Fire Ins. Co. vs. Kinyon*, 37 N. J. L. 33, 36.

A resident in New York solicited by letter addressed to a Massachusetts corporaton in that State and not authorized to do business in New York, a policy of insurance on property in New York. The Massachusetts company accepted the proposal and mailed the policy. The New York Court of Appeals said of this transaction: This resulted not in the transaction of business in New York but in the consummation in Massachusetts of a contract which was lawful in New York. *Huntington vs. Sheehan*, 206 N. Y. 486, 489. And see *Stone vs. Penn Yan, K. P. & B. Ry.*, 197 N. Y. 279.

And the New York Courts have said that the Legislature has no power to prohibit a resident of New York entering into a contract with a corporation of another State having a right to do business therein, as a law of one State which interferes with the constitutional right of an insurance company of another State to make them would be void or to that extent unconstitutional. *Hammond vs. International Insurance Co.*, 116 N. Y. Supp. 854, aff'd 119 N. Y. Supp. 1127, 134 App. Div. 995."

* * * * * *

"We are satisfied that while a State, for reasons satisfactory to itself, may exclude from its boundaries a foreign corporation not engaged in interstate or foreign commerce, if it licenses it to do business within its territories it cannot thereafter revoke the license because it does business in some other State in a manner consistent with its laws and makes contracts there with residents of the objecting State—the laws of which have not restricted such residents' freedom of contract." [A proposition equally sound without the added dozen words.]

"It has been held that a State has the right to exclude any foreign corporation not engaged in interstate or foreign commerce and can impose such conditions and limitations upon its right to do business within the State as it sees fit. *Opinion of Justices, In re*, 97 Me. 590..

And in *Doyle vs. Continental Insurance Co.*, 94 U. S. 535, 541, the Court said:

'A license to a foreign corporation to enter a State does not involve a permanent right to remain * * *. Full power and control over its territories, its citizens, and its business, belong to the State.

If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *

If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.'

In the *Doyle* case the Court reaffirmed *Insurance Company vs. Morse*, 20 Wall. 445, and held that a State law was not unconstitutional which revoked a license to a foreign corporation to do business within the State because while doing only a domestic business in the State it resorted to the federal court sitting in the State. But the *Morse* case and the *Doyle* case in so holding have been overruled and the law is now established in accordance with the views of the minority Judges in those cases. *Terral vs. Burke Construction Co.*, 257 U. S. 529, 533." [This reference to the *Morse* case as overruled is an inadvertence. The *Prewitt* case (202 U. S. 246), not the *Morse* case, was overruled.]

[Opinion printed in full as Appendix D to this brief, *infra* 20-42.]

(*c*) Still more recently the federal court for western Wisconsin (CIRCUIT JUDGE EVANS and DISTRICT JUDGES GEIGER and LUSE) in *Chrysler Sales Corporation vs. Smith, Commissioner of Insurance,* (decided November 20, 1925, opinion by JUDGE LUSE), considered the same Chrysler insurance contract. The Palmetto Fire Insurance Company is *not* authorized to do business in Wisconsin. In the *Smith* case the court held (disagreeing with the opinions in *both* the *Conn* and the *Beha* cases), (1) that the Chrysler dealers who sell cars in Wisconsin thereby act as *agents of the insurance company,* and, therefore, (2) as to cars sold in Wisconsin the Chrysler insurance contract is not a Michigan contract but a Wisconsin contract. From these premises it necessarily followed that the operation of the Chrysler insurance contract violates the laws of Wisconsin. Whether these premises are sound is a complex question of law and fact which is *not* material *in the present case.*

(*d*) The case of *Scott, Commissioner of Insurance, vs. Smelker,* was argued in the Texas Court of Civil Appeals for the Third District on October 28, 1925, but has not yet been decided. In that case the trial court enjoined the Commissioner of Insurance from enforcing an order, addressed to all companies "writing fire and miscellaneous insurance in Texas,"—

> "That all or no part of any commission in consideration or on account of any policy or policies covering property, person or persons within the State of Texas is to be paid any non-resident agent or broker either directly or indirectly; that the practice engaged in by some companies of having a resident licensed agent in Texas, pro forma to countersign a policy for which he receives a part of the commission, the balance being paid to a non-resident agent or broker, is in violation of the law and must not be continued."

The trial court filed the following conclusions of law:

"First: It is the opinion of the Court, under the uncontradicted facts set out and agreed to in the pleadings, that no law of the State of Texas authorizes or supports the order of the defendant complained of." [The Texas insurance laws differ materially from the New Mexico resident agent legislation.]

"Second: The Court finds that if any statute or statutes of the State of Texas by any reasonable construction can be held to support the order of the defendant complained of, the said statute or statutes, in so far as they do or might furnish such support, are invalid as denying to the plaintiffs and each of them rights guaranteed to them by the Constitution of the State of Texas and by the Constitution of the United States."

Respectfully submitted,

C. J. ROBERTS,
CHARLES MARKELL,
Counsel for Appellant.

APPENDIX C.

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Ohio.

EASTERN DIVISION.

Palmetto Fire Insurance Company, Plaintiff, *vs.* Harry L. Conn, Superintendent of Insurance for the State of Ohio, Defendant.	}	No. 384 In Equity.

Per Curiam.

The Palmetto Fire Insurance Company is an insurance corporation, organized and existing under the laws of the State of South Carolina. The defendant, Harry L. Conn, is the duly appointed, qualified, and acting superintendent of Insurance of the State of Ohio, and a citizen and resident of the State of Ohio.

It is averred in the petition that the matter in controversy exceeds, exclusive of interests and costs, the sum or value of $3,000.00.

In 1924 the plaintiff applied for admission to the State of Ohio and for the right to do the business of re-insurance in the state, and was granted such right and duly licensed by the Superintendent of Insurance

of Ohio. The plaintiff brings this action to enjoin the defendant, as Insurance Commissioner of Ohio, from revoking the license of the plaintiff to do an insurance business in Ohio and also from in any wise interfering with the operation and carrying out of a certain contract between the plaintiff and the Chrysler Sales Corporation,—a corporation organized and existing under the laws of the State of Michigan.

Before the day set for the hearing of the motion for a temporary injunction by the Court as now constituted, the defendant filed his answer, and by consent of counsel this cause was finally submitted, upon its merits.

It further appears from the bill of complaint, that on the 16th day of June, 1925, complainant, who was then duly authorized to do business in the State of Michigan, entered into what is called an "open contract of Insurance" with the Chrysler company, which was later modified by a rider attached thereto, and in which it was expressly provided that the rider should supersede and take the place of anything to the contrary in the original contract; that under the terms of the original and supplemental contract, the plaintiff agreed to issue certificates of insurance to purchasers of Chrysler cars, wherever sold, the loss, if any, payable to the purchaser of such car if the purchase price had been paid in full, or, if not, then to the dealer or finance company financing the same, the excess thereof to be paid by the dealer or finance company to the owner. It further appears that this open contract of insurance does not purport to cover any particular specific property, and does not touch or cover any property until the car is actually sold by the dealer to his customer. The Chrysler Company, however, collects from its dealers in the several states whenever the car is delivered to such dealer the amount of pre-

mium contracted to be paid for such insurance, and the dealer in turn collects a like amount from the purchaser of the car as a part of the purchase price thereof. The sale is then reported and a certificate of insurance is issued to the purchaser. The Chrysler Company is required to make monthly statements of the sales made by its dealers, and remit to the plaintiff the contract amount of the premiums on all sales made in the prior month. On June 30, 1925, the defendant notified the Chrysler Company by letter that it would be required to comply with the laws of Ohio in reference to insurance, if its plan included in its contemplation Chrysler cars sold in Ohio.

On the 30th day of July, 1925, the plaintiff submitted defendant a copy of this contract and supplemental contract designated as "an open contract" or "a running policy," between the Chrysler Company and the insurance company, and thereupon the defendant notified the complainant, that in his opinion the plan was unlawful and prohibited by the statutes of Ohio, and notified counsel for plaintiff, that on Thursday, August 6, 1925, at 10 o'clock A. M., he would consider the revocation of plaintiff's Ohio license on the ground that the Company was violating the Ohio Insurance laws.

Counsel for the plaintiff did not appear at the time named, but on the contrary, on the same day and shortly before that hour, notified the Commissioner of Insurance that it intended to bring this action. The order revoking the license was then made and entered by the Commissioner, and notice forwarded to the plaintiff. On the same day and a few hours thereafter, the plaintff filed this bill of complaint, and the Court, without being advised that the order had already been made, allowed a temporary restraining order.

It is claimed that on the part of the defendant, that because the order was made after notice that the bill

was to be filed and before the bill was filed or the temporary restraining order allowed, that this Court has no jurisdiction to restrain the doing of a thing that already has been done.

With this contention we do not agree. Hasty action to anticipate litigation may be rectified by mandatory injunction and a restraining injunction may be issued to prevent the Commissioner from carrying this order of revocation into effect.

St. Louis & S. F. Ry. Co. vs. Cross, 171 F., 480, 495;

Harrison vs. St. Louis & S. F. Ry. Co., 232 U. S., 319, 332.

The Commissioner of Insurance heard no evidence and made no finding of fact, but it does appear that his action was based on the complainant's open insurance contract with the Chrysler Company which had been filed with him, and the method of doing business thereunder, as fully explained by counsel. These same facts also appear from the plaintiff's bill. It follows, therefore, that if the plaintiff's Contract and method of doing business violates any valid statute of Ohio, or any lawful regulation which the State of Ohio may enforce, it would be a useless and futile thing to grant an injunction ordering a cancellation of the order of revocation, even though hastily and informally made. Under such a state of facts the plaintiff is without equity. It is the claim of the plaintiff that notwithstanding the insurance contemplated in the open or running contract does not take effect upon any property whatever until the car is actually sold by a dealer in Ohio to his customer in Ohio, after and in pursuance such contract of purchase including car and insurance thereon is not an Ohio contract, but a Michigan contract, and is an act done in furtherance of the Michigan

contract entered into between the Chrysler Company and the insurance company. However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing, or causing to be written or placed, insurance upon property situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record.

While this Section is in furtherance of the state taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio. If it were conceded that these special policies of insurance issued to the Ohio purchasers of cars, the premium on which he pays to the Ohio dealer to reimburse him for the amount he paid to the Chrysler Company when he purchased the car from Chrysler are Michigan contracts, nevertheless it is a violation of the law of Ohio, which fixes the terms and conditions upon which the plaintiff may do business in Ohio.

This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases and from whom he pleases, nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the statute. In other words, it may not accept the benefits of the right and privilege of doing an insurance business in Ohio, and reject the conditions imposed by the statute.

Chrysler retail car dealers are not insurance agents nor are they qualified or have they attempted to qualify as such under the insurance laws of the State.

The application for an interlocutory injunction and the prayer for permanent injunction will therefore be denied and the case dismissed at the cost of the Complainant.

MAURICE H. DONAHUE,
Circuit Judge.

C. C. WESTENHAVER,
District Judge.

BENSON W. HOUGH,
District Judge.

APPENDIX D.

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of New York.

Palmetto Fire Insurance Company,
Plaintiff,
against
James A. Beha, as Superintendent of Insurance of the State of New York,
Defendant.

Before:

Rogers, Circuit Judge, and
Hand and Knox, District Judges.

Hartwell Cabell, for Plaintiff; Milton B. Ignatius, James M. Lown, of Counsel.

Albert Ottinger, Attorney-General of the State of New York, for Defendant; Claude T. Dawes, Joseph C. H. Flynn, Deputies Attorney-General; Clarence C. Fowler, Special Deputy, of Counsel.

Rumsey & Morgan, for New York Fire Insurance Rating Organization, (As *Amicus Curiae*).

Rogers, Circuit Judge. This suit is brought to enjoin the Superintendent of Insurance of the State of

New York from revoking a license which he had granted to the Palmetto Fire Insurance Company, a South Carolina corporation, authorizing it to transact within the State of New York the business of fire insurance as provided in the Insurance Law of the State.

While this is a suit solely against the defendant Beha, and against him as Superintendent of Insurance, it appears that the Governor of the State of New York and the Attorney General as well as the Superintendent of Insurance were served with the subpoena, a copy of the bill of complaint and of the order to show cause. These officials all appeared specially and not otherwise. They filed what they call "Suggestion to the Honorable Federal Judges." In it they set forth that the suit is in fact and according to the law of the land one against the sovereign State of New York and the People thereof, and that as it was brought by a citizen of another State, it was in violation of and contrary to the Constitution of the United States and that this court therefore is without jurisdiction to entertain the suit, and without power to grant the relief which is asked.

We shall at once consider the question of jurisdiction, for if the court is without jurisdiction we can do nothing but dismiss the bill.

Prior to the Eleventh Amendment the judicial power was held to extend to a suit by a citizen of one State against another State, such suit being within the original jurisdiction of the Supreme Court. *Chisholm v. Georgia*, 2 Dallas, 419. But this led to the adoption of the Eleventh Amendment since which time the Federal judicial power does not extend to suits against a State brought by a citizen of another State. *Carolina Glass Company v. South Carolina*, 240 U. S. 305. This immunity from suit is a personal privilege and may be waived in a case otherwise within the jurisdiction

of the court. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273. In this action it not only has not been waived but is earnestly asserted.

The Eleventh Amendment reads:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State * * *."

And Section 2 of Article III provides that

> "In all cases affecting Ambassadors * * * and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

The State of New York is not a party to this proceeding. It is elementary that a State cannot be sued even in its own courts by one of its own citizens without its consent and such a suit cannot be brought in its own courts even on a cause of action arising under the Constitution and laws of the United States. *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22.

The prohibition of suits in the federal courts against a State without its consent does not, however, preclude an action against a State officer unless such officer is only a nominal defendant and the State is the real party in interest. *Carolina Glass Co. v. South Carolina, supra.* And it is well settled law that a suit to restrain a State officer from acting under a Statute which it is charged violates the Constitution of the United States or otherwise violates constitutional rights, is not a suit against the State and is within the federal jurisdiction. *Looney v. Crane Co.*, 245 U. S. 178; *Louisville &c. R. R. Co. v. Greene*, 244 U. S. 522; *Hopkins v. Clemson Agricultural College*, 221 U. S. 634; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S.

273; *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165. In *Looney v. Crane Co., supra*, which was a suit to enjoin the Attorney General of Texas from enforcing an unconstitutional tax it was contended that the United States District Court in Texas was without jurisdiction on the ground that it was in substance a suit against the State. The Supreme Court, speaking through CHIEF JUSTICE WHITE, thus disposed of the contention:

> "There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the State officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278."

The suggestion that the court is without jurisdiction to hear and determine this case must be dismissed as without merit.

The Palmetto Fire Insurance Company, a corporation created under the laws of the State of South Carolina, has its principal place of business in Sumter in that State. Its capital stock at the time it was incorporated in 1912 was $25,000 but it has since been gradually increased until now it is fixed at $400,000. Its charter did not in terms expressly authorize insurance against theft. The record contains the affidavits of its president, and its vice-president, the latter being also one of the attorneys of the Palmetto Company. From those it appears that the officers honestly be-

lieved that its charter was broad enough to cover the writing of theft insurance. Subsequently the question was raised whether after all there was power to write such insurance and the charter was amended as of August 1, 1925, which authorized it to write theft insurance as well as fire insurance.

The Chrysler Corporation, which seems to be a Michigan corporation with its principal place of business in Detroit, manufactures the Chrysler cars.

The Chrysler Sales Corporation is a corporation created under the laws of the State of Michigan with its main office in the City of Detroit. It purchases the entire output of the Chrysler Corporation and markets the same. The Sales Corporation, having a certain list price upon each type of Chrysler car, sells the cars for cash to distributors throughout the country on the basis of the list price less a given discount, plus the war tax and plus certain delivery charges. The distributor likewise sells to the dealer on the basis of the list price less a smaller discount, plus the war tax and delivery charges.

The Chrysler Sales Corporation insures all Chrysler cars sold by it against loss by fire, transportation, and theft. This it does under an agreement with the Palmetto Fire Insurance Company, whereby every car manufactured and sold by the Chrysler Sales Corporation is immediately and automatically insured in Detroit in a regular automobile policy issued by the Palmetto Company. The policy assures the Chrysler Sales Corporation "and/or for account of whom it may concern." It becomes effective only when a car is sold to a retail purchaser.

The Palmetto Company on receipt at its Detroit office of an information blank filled in by the Chrysler Sales Corporation giving the purchaser's name, residence, car number, name of the finance concern, if any,

issues to each purchaser a certificate showing the car was insured under what is known as Master Policy 9562, and the insurance on the said car then applies for account of the purchaser and the holder of the sales contract named in the certificate.

The premium on each car is paid in Detroit by the Chrysler Sales Corporation, and that corporation receives no commission from anyone or in any way therefor. And the dealer when selling a car sells it at the price fixed by the Sales Corporation, and he collects no commission on any part of the insurance carrying charge. In selling Chrysler cars no deviation from the price to be charged can be made because no insurance is desired by the purchaser. If the purchaser desires insurance from some other insurance company he is at liberty to procure it.

The Commercial Credit Company is a corporation organized under the laws of the State of Delaware with its principal office in Baltimore, Maryland. It is disclosed that there is a Commercial Credit Corporation at New York City, a Commercial Credit Trust at Chicago and a Commercial Credit Co., Inc., at New Orleans. These all appear to be affiliated companies and they may operate in financing the retail sale or lease of Chrysler cars. This means that they purchase or loan upon, or otherwise acquire the notes or securities given to dealers in connection with the purchase or lease of Chrysler cars at retail.

The insurance is effected by an open policy running from the Palmetto Fire Insurance Company to the Chrysler Sales Corporation. The policy is executed in Detroit, where the principal office of the Sales Corporation is located and where the Insurance Company maintains a general agency. It insures all Chrysler six cylinder, four cylinder and commercial cars which may be sold during the policy year, beginning July 1,

1925. The policy covers the full retail purchase price for the term of one year from the date of the sale to the purchaser. By the terms of the policy the Sales Corporation is entitled to a certificate in its name for the account of whom it may concern whenever a car is reported to it as having been sold at retail. The certificate names the purchaser and is sent to him, and in counterparts to others who have an equity in the car, such as finance companies, and banking concerns discounting purchase money notes.

The contract existing between the Palmetto Company and the Chrysler Sales Corporation under which the Insurance Company issues certificates of insurance upon Chrysler cars is the important, but not the sole, ground for the threatened revocation of the license heretofore granted authorizing the Palmetto Company to do business in the State of New York. In carrying out that contract the Superintendent of Insurance of the State of New York claims that the Palmetto Company is violating the laws and public policy of New York. Whether this claim is justified is the question we must determine.

The power of a State to regulate business which is affected with a public interest when transacted within its borders, whether by a domestic or a foreign corporation, is not open to question.

That the business of interstate insurance is not interstate commerce, and as such is not beyond State regulation, has long been settled. *Paul v. Virginia*, 8 Wall. 168.

But the business is quasi public in character, and within the right of the State to determine who may engage in it within its boundaries, and upon what terms and conditions the business is to be conducted. It may regulate the business and all persons engaged in it. In *German Alliance Insurance Co. v. Kansas*,

233 U. S. 389, 405, it was argued that the business of fire insurance is a private business and that there is no constitutional power in a State to fix rates and charges for services rendered by it. The argument was set aside as unsound, and in a carefully considered and extended opinion by Mr. JUSTICE MCKENNA the court sustained the constitutionality of the Kansas Statute regulating fire insurance rates. In the statutes of every State in the Union superintendence and control over the business of insurance are exercised. "Those regulations," said the Court in the Kansas case, "exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation."

The State has power either wholly to exclude a foreign insurance company from doing business within its limits, or to impose on it such terms and conditions as it deems proper as a condition precedent to its right to do business within its limits. *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489; *Carrol v. Greenwich Ins. Co.*, 199 U. S. 401; *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602.

The State cannot forbid contracts of insurance relating to risks within its limits from being made between a citizen and a corporation in another State. *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 397; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 373; *New York Life Insurance Co. v. Head*, 234 U. S. 149; *Allgeyer v. Louisiana*, 165 U. S. 578; *Nutting v. Massachusetts*, 183 U. S. 553, 557; *Delamater v. South Dakota*, 205 U. S. 93, 102; *Provident Savings Association v. Kentucky*, 239 U. S. 103, 114; *Adams v. Tanner*, 244 U. S. 590, 595. An attempt of that kind would be an unlawful invasion of the citizen's liberty of contract under the Fourteenth Amendment.

The Palmetto Fire Insurance Company, being a South Carolina corporation, in 1918 applied for a license to do business in the State of New York, and on December 6th of that year such license was issued to it by the Superintendent of Insurance. It recited that the Company had "complied with all the requirements of law," and that it was "authorized to transact within this State the business of Fire Insurance as provided by Article III of the Insurance Law, until April 30, 1919." This license was renewed up to and including April 30, 1923. About that time it gave notice to the Superintendent of Insurance that it intended to retire from the State of New York. But on December 9, 1924, it again applied to the Superintendent of Insurance, and a license was granted to it on December 20, 1924, which again recited that the Company had "complied with all the requirements of law." On May 1, 1925, the Superintendent of Insurance again granted to the Company a license to transact within the State of New York the business of Fire Insurance until May 1, 1926. That license is still in full force and effect.

The New York Statute gives to the Superintendent of Insurance the power to revoke a license issued to a foreign corporation authorizing it to do business in the State. It provides as follows:

> "Whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state, he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state, prior to its expiration under this section. The action of the superintendent of insurance in revoking the certificate of authority of a foreign corporation shall be subject to review by writ of certiorari."

A license is merely a permit or privilege to do what otherwise would be unlawful. The purpose of it is to regulate and control the manner in which the business is conducted and prevent its being carried on in such a way as to injure public interests. And it may be issued for both regulation and revenue. A license is a mere privilege and is not a contract. *Metropolitan Excise Board v. Barrie*, 34 N. Y. 657; *Burgess v. Brocton*, 235 Mass. 95; *Balling v. Elizabeth Excise Board*, 79 N. J. L. 197. It is not a property right. *Jones v. Motley*, 78 Ala. 370; *Voight v. Newark Excise Board*, 59 N. J. L. 358; *Public Service Commission v. Booth*, 170 App. Div. (N. Y.) 590; affirmed in 155 N. Y. S. 568. And it has been held not to create a vested right. *Laing v. Americus*, 86 Ga. 756; *State v. Cote*, 122 Me. 450; *Newson v. Galveston*, 76 Tex. 559; *Littleton v. Burgess*, 14 Wyoming, 173. It appears that the license herein involved authorized the Palmetto Fire Insurance Company to transact business in the State of New York "as provided by" the Insurance Law of New York, and as that law expressly provided that the license might be revoked by the Superintendent of Insurance prior to the expiration of the time for which it was issued, the Fire Insurance Company took its license upon that understanding. But if power of revocation had not been expressly reserved we think it nevertheless might have been subject to revocation for cause.

The revocation of the license, however, cannot be made arbitrarily even though the revoking authority is by the Statute given a discretionary power. It must be for cause shown. *Klafter v. State Board of Examiners*, 259 Ill. 1.

But the question which we must decide is not, however, whether the contracts made in Michigan are valid contracts of insurance. Neither is it whether the State

of New York can deprive citizens of that State of the right to enter into contracts of insurance in some other State upon property situated in the State of New York. This it has not attempted by Statute to do. We are not now concerned with the validity of the contract made between the Palmetto Fire Insurance Company and the Chrysler Sales Corporation or the contract between the latter and the Commercial Credit Company. For the purposes of this case we may assume that those contracts are valid. What we must determine is whether this court, at this time, has the right to restrain the Superintendent of Insurance of the State of New York and thereby prevent him from revoking the license heretofore granted to the Palmetto Fire Insurance Company, a foreign corporation, and which authorizes it to do business in the State of New York.

It is alleged in the "Suggestion" submitted to the Court by the State of New York that the Palmetto Company, in making application for, accepting and retaining the licenses issued by the State, represented that if granted the privilege of doing business in the State it would conduct its business in accordance with the laws of New York and that all of its transactions within the State would be lawful. It is further alleged that having obtained its license it thereafter in violation of the laws of the State "and for the purpose of cheating and defrauding the State of New York and the People thereof out of taxes and revenues on business transacted in the State of New York, entered into a plan of concerted action with the Chrysler Sales Corporation and others by which it agreed to issue insurance contracts to citizens of New York on all Chrysler automobiles sold in the State of New York under an instrument in writing in form and appearance being its standard form of policy, but being in

fact an instrument in writing made as part and parcel of said plan of concerted action to conceal and hide from the State of New York and the People thereof and the citizens to whom it agreed to issue its certificates under said plan, the amounts received for premiums, and by so doing cheating and defrauding the State of New York and the People thereof out of taxes and revenues on whatever sums for premiums might be collected from citizens of this State under said plan."

Then it goes on to say that by entering into the plan above mentioned the Insurance Company has violated its charter and the laws of New York, and in attempting to carry out the said plan has destroyed completely its integrity with the State of New York and the People thereof, and on that account it is desired to hold the hearing provided for in the State's insurance statutes to determine "whether or not in the judgment of the Superintendent of Insurance it will best promote the interests of the People of the State of New York to revoke the certificate of authority of the Palmetto Fire Insurance Company."

In *Allgeyer v. Louisiana*, 165 U. S. 578, 583, Mr. Justice Peckham, writing for the court, said:

> "There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon *the doing of any business by those companies within its borders*, and unless the conditions be complied with the prohibition may be absolute."

And in *Hooper v. California*, 155 U. S. 648, 655, Mr. Justice White said:

> "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine busi-

> ness. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

Here again it was said that the State has power to enact and enforce all legislation in regard to things done within the territory of the State.

Have the things herein complained of been done within the State of New York by the Palmetto Fire Insurance Company so that the authorities of that State have the right to take cognizance thereof? If the Palmetto Fire Insurance Company, in the transaction of its business within the State of New York, does not violate the laws of New York can its license to do business within the State be revoked because of the manner in which it conducts its business in some third state in which its business is validly conducted? That, it seems to us, is the question presented in this case.

At the argument our attention was called to *Palmetto Fire Insurance Company v. Harry L. Conn*, decided by the United States District Court for the Southern District of Ohio, Eastern Division, and not yet reported. The defendant in that case was the Superintendent of Insurance for the State of Ohio. In that case, as in this, the Palmetto Company sought an injunction to restrain the revocation of a license. The Superintendent of Insurance had licensed the Palmetto Company to do business in that State which license he intended to revoke, and on the same day the suit was brought did revoke, on the ground that the Palmetto Company in issuing certificates of insurance in Michingan under its contract with the Chrysler Sales Corporation, in so far as such certificates applied to Chrysler cars sold in Ohio, violated the insurance laws of that State. It was contended by the plaintiff that the certificate was issued, not under an Ohio contract, but under a Michigan contract validly made between the Chrysler Sales Corporation and the Palmetto Company. The court, while it did not deny that the contract was a Michigan contract, said:

> "However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing or causing to be written or placed, insurance upon property situated or located in this State, except through a legally authorized agent in this State, who shall countersign all policies so issued and enter the payment of the premium upon his record.
>
> "While this section is in furtherance of the State's taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio.
>
> "* * * This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases or from whom he pleases,

> nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but, on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the Statute."

If the Insurance Laws of New York contained a similar provision to that above cited prohibiting any insurance company authorized to do business in this State from insuring property within this State except through a legally authorized agent in the State, the *Conn* case would be an authority to support the defendant's contention that the relief sought should be denied. But our attention has not been called to such a provision in the New York law. The contention here seems to be that the Palmetto Company in entering into a valid contract in Michigan with the Chrysler Sales Corporation has in some way violated the laws and public policy of the State of New York "and for the purpose of cheating and defrauding the State of New York and the People thereof out of taxes and revenues on business transacted in the State of New York entered into a plan of concerted action with the Chrysler Sales Corporation and others by which it agreed to issue insurance contracts to citizens of New York on all Chrysler automobiles sold in the State of New York under an instrument in writing in form and appearance being its standard form of policy, but being in fact an instrument in writing made as part and parcel of said plan of concerted action to conceal and hide from the State of New York and the People thereof and the citizens to whom it agreed to issue its certificates under said plan, the amounts received for premiums, and by so doing cheating and defrauding

the State of New York and the People thereof out of taxes and revenues on whatever sums for premiums might be collected from citizens of this State under said plan."

At the time the Palmetto Company sought and obtained its license to do business in the State of New York it undoubtedly became bound to transact its business in that State according to the laws of New York. In making the contract it did with the Chrysler Sales Corporation in Michigan and in acting under it, it was not doing business in New York. The general rule is that a foreign corporation is not doing business in a State by entering into contracts with residents thereof, where the contracts are made and are to be performed elsewhere, although the contracts relate to property within the State. And where applications for insurance are obtained in a state by an agent of a foreign company and forwarded by him for acceptance or rejection to a company at a place outside of the State, the company is not doing business in the State wherein the applicants reside by accepting and issuing policies in pursuance thereof at such outside office. *Lamb v. Bowser*, 14 Fed. Cas. No. 8009, 7 Biss. 372; *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258; *Stone v. Old Colony St. R. Co.*, 212 Mass. 459; *Clay Fire & Marine Ins. Co. v. Huron Salt &c. Mfg. Co.*, 31 Mich. 346; *Connecticut River Mutual Fire Insurance Co.*, 62 N. H. 622, 32 Cyc. 996.

The policy which is issued at Detroit, Michigan, under the plan insures the Chrysler Sales Corporation on cars sold together with others who may have an interest therein including the ultimate purchaser in New York, who pays no premium but can take advantage of the insurance if he chooses to avail himself of it. No renewal of the policy is allowed. It amounts to a gift of insurance for one year if the ultimate purchaser of a Chrysler car sees fit to avail himself of it.

The State of New York, if it has the constitutional right to prohibit the transaction, has not done so. As the transaction is valid in Michigan and is not invalid in New York it affords, in our opinion, no legal cause for the cancellation of the Palmetto Company's license to do business in New York.

The Superintendent of Insurance disapproves the Chrysler-Palmetto plan and regards it as in violation of the laws and public policy of the State of New York. The insurance effected under the plan is effected in Michigan and not in New York. We know of nothing in the law of New York which prohibits the owner of a Chrysler car in New York from accepting insurance upon the car effected under a Michigan contract. And the Palmetto Company in insuring in Michigan a Chrysler car owned in New York by a resident thereof is not doing business in the latter State and therefore is not as to such contracts doing business in New York and contrary to its laws.

The State of New York cannot by its statutes control or impair transactions which are extra-territorial. In *Allgeyer v. Louisiana*, 165 U. S. 578, the Supreme Court had before it a statute enacted by the Legislature of Louisiana which subjected to fine any person or firm who should fill out, sign or issue in the State of Louisiana any certificate of insurance under an open marine policy, or who in any matter whatsoever should do any act in the state to effect for himself or for another, insurance on property then in the state, in any marine insurance company which had not complied with the laws of the State. The court held the statute unconstitutional.

A policy is not invalid which is issued in the State of Michigan to a citizen of New York upon property in the latter State. See *Baker v. Spaulding*, 71 Vt. 169; *Pennypacker v. Capital Insurance Company*, 80

Iowa, 86; *Phoenix Insurance Co. v. Pennsylvania Ins. Co.*, 134 Ind. 215; *Strampe v. Farmers Mutual Insurance Co.*, 109 Minn. 364; *Clay Fire and Marine Ins. Co. v. Huron Salt and Lumber Mfg. Co.*, 31 Mich. 346; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33, 36.

A resident in New York solicited by letter addressed to a Massachusetts corporation in that State and not authorized to do business in New York, a policy of insurance on property in New York. The Massachusetts company accepted the proposal and mailed the policy. The New York Court of Appeals said of this transaction: This resulted not in the transaction of business in New York but in the consummation in Massachusetts of a contract which was lawful in New York. *Huntington v. Sheehan*, 206 N. Y. 486, 489. And see *Stone v. Penn Yan, K. P. & B. Ry.*, 197 N. Y. 279.

And the New York courts have said that the Legislature has no power to prohibit a resident of New York entering into a contract with a corporation of another State having a right to do business therein, as a law of one State which interferes with the constitutional right of an insurance company of another State to make them would be void or to that extent unconstitutional. *Hammond v. International Insurance Co.*, 116 N. Y. Supp. 854, affi'd 119 N. Y. Supp. 1127, 134 App. Div. 995.

The Superintendent of Insurance states that according to its last annual report the capital and surplus of the Palmetto Fire Insurance Company did not exceed $663,000. He states that the Company, by the Palmetto-Chrysler plan, has subjected itself and its capital and surplus to a liability greatly in excess thereof and in violation of the laws of New York which provide that such a corporation shall not expose itself on any one loss or any one risk or hazard to an amount

exceeding ten per centum of its capital and surplus. The law of New York is as he states it. But his statement that the Company has violated the New York law in the particular mentioned is unsupported by any evidence and is directly contradicted by the president of the company. In his sworn statement he flatly denies that his company has in any way impaired its capital and surplus by reason of the Palmetto-Chrysler contract. He adds that "as a matter of fact the said contract will in the opinion of deponent prove quite profitable and this is borne out by the experience so far under said contract. That while a large number of automobiles will be insured, no one risk is in excess of ten per centum of the capital of the said corporation, the maximum liability of any one car being Twenty-one Hundred and Ninety-five ($2195.00) Dollars, and the minimum on any one car being Nine Hundred and Ninety-five ($995.00) Dollars. The cars insured are owned by individual owners scattered throughout the United States; there is no conflagration hazard; that the cars are owned largely by the better class of citizens; the moral hazard is good, and no car is insured unless equipped with an approved lock device, and only insured for one year from date of purchase, without any renewal privilege."

And the vice-president of the Company in his sworn statement denies that it has impaired its capital or surplus by the Palmetto-Chrysler contract. He states that in his opinion the contract is advantageous "and will prove profitable and certainly the experience so far under said contract bears this opinion out. That no one hazard exceeds 10% of the capital and surplus of the said Palmetto Fire Insurance Company or approaches this percentage. On the contrary, automobiles covered being scattered throughout the United States, practically only one automobile at a time being

subject to any one fire or theft; that it is highly desirable business being written for only one year from the sale of said car; the car being of the better class and being purchased by the better class of citizens throughout the country the moral hazard is of the best."

We think that no justification is shown for thinking that the assets and resources of the Palmetto Fire Insurance Company are not ample and sufficient to guarantee the performance of all its obligations. It is not doubted that if an examination into its financial condition discloses its condition is such that its transaction of business in New York will be hazardous to its policy holders, or to its creditors or to the public, its license may be revoked. While there is nothing in this record which discloses that the company is in such financial condition, this court does not think it should now interfere to prevent any investigation into that subject which the Superintendent of Insurance thinks it his duty to institute.

The Superintendent of Insurance demanded that the Palmetto Company turn over to it a certain contract of June 11, 1925. Its officers state under oath that they have never had such contract and have never read it and that the contents are unknown to them. He also states that in an investigation he directed to be made into the Chrysler-Palmetto plan his examiners reported to him that the Palmetto Company refused to give information as to the premium rates on such business. But the president of the Insurance Company in a sworn statement denies that it has at any time refused to furnish the Department with any information the Department requested and which was in the power of the Company to furnish. And the vice-President of the Company in a sworn statement declares that its representatives had informed the Department that they

would furnish at any time all information it requested which was within their power to give. We do not now undertake to adjudge whether the Insurance Company is withholding information which is within its power and duty to give.

It appears that the Superintendent of Insurance complains that the Palmetto Company has written policies of insurance against theft under a charter which did not give it such authority. If the Palmetto Company had no power under its original charter to insure against theft the State of South Carolina, which created it, has jurisdiction to call it to account. Whether under the laws of that State its courts would hold that the broad powers granted to it, in its original charter, were sufficiently broad to warrant its insurance against theft we do not know and are not called upon to decide. The officers of the Company honestly thought they could lawfully write such insurance, but as they found some doubt was entertained as to their right to do this they had the charter amended and the power expressly conferred. We do not think that the doubt as to the existence of the right of the Palmetto Company to write theft insurance under its original charter, now that the charter has been amended and the power conferred, constitutes a legal ground for the revocation at this time of the license to do business in the State of New York especially as it does not appear that it ever wrote such insurance "wilfully" in the State of New York.

We are satisfied that while a State, for reasons satisfactory to itself, may exclude from its boundaries a foreign corporation not engaged in interstate or foreign commerce, if it licenses it to do business within its territories it cannot thereafter revoke the license because it does business in some other State in a man-

ner consistent with its laws and makes contracts there with residents of the objecting State—the laws of which have not restricted such residents' freedom of contract.

It has been held that a State has the right to exclude any foreign corporation not engaged in interstate or foreign commerce and can impose such conditions and limitations upon its right to do business within the State as it sees fit. *Opinion of Justices, In re*, 97 Me. 590.

And in *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 541, the Court said:

> "A license to a foreign corporation to enter a State does not involve a permanent right to remain * * *. Full power and control over its territories, its citizens, and its business, belong to the State.
>
> "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *
>
> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world."

In the *Doyle* case the Court reaffirmed *Insurance Company v. Morse*, 20 Wall. 445, and held that a State law was not unconstitutional which revoked a license to a foreign corporation to do business within the State because while doing only a domestic business in the State it resorted to the federal court sitting in the

State. But the *Morse* case and the *Doyle* case in so holding have been overruled and the law is now established in accordance with the views of the minority Judges in those cases. *Terral v. Burke Construction Co.*, 257 U. S. 529, 533.

Counsel may present a decree enjoining the defendant as Superintendent of Insurance of the State of New York from revoking the license issued to the Palmetto Fire Insurance Company authorizing it to do business in the State of New York, on the ground that the Chrysler-Palmetto plan and the insurance written in accordance therewith in the State of Michigan constitute a violation of the laws and public policy of the State of New York.

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STANS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 88.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellant,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.,

Appellees.

MOTION FOR SUBSTITUTION OF PARTIES.

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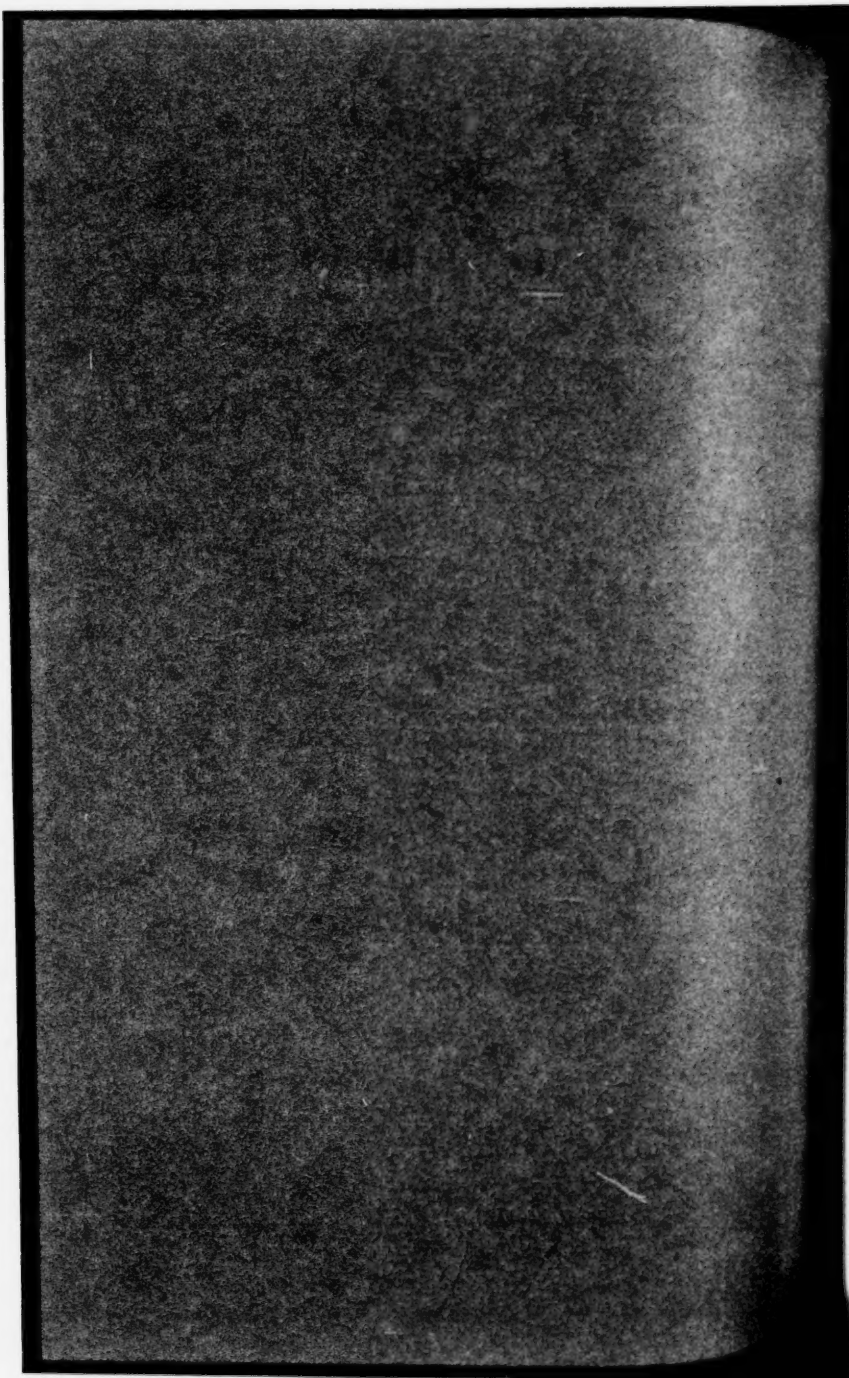

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MOTION FOR SUBSTITUTION OF PARTIES.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Fidelity and Deposit Company of Maryland, appellant, respectfully shows:

1. Your petitioner, plaintiff below, filed its bill of complaint in the District Court of the United States for the District of New Mexico against the appellees, defendants below, J. M. Luna, Chairman, and Hugh H. Williams and

Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, and L. B. Gregg, State Bank Examiner of New Mexico. The bill was filed January 8, 1924 (R. 1); the final decree April 30, 1924 (R. 15). An appeal to this Court was immediately prayed by your petitioner and allowed by the District Judge April 30, 1924. (R. 17.)

2. On January 1, 1925, the term of office of the appellee, J. M. Luna, as a member of the State Corporation Commission of New Mexico expired, and said appellee was succeeded as a member of the State Corporation Commission of New Mexico by Ed. C. Tafoya, who was duly elected and qualified, ever since has been and now is a member of the State Corporation Commission of New Mexico and then was, ever since has been and now is a citizen of the State of New Mexico and a resident of the State and District of New Mexico. The appellees, Hugh H. Williams and Bonifacio Montoya, and the aforesaid Ed. C. Tafoya, constitute the State Corporation Commission of New Mexico, which has a continuing existence. Section 1 of Article XI of the Constitution of the State of New Mexico provides:

> "A permanent commission to consist of three members is hereby created, which shall be known as the 'State Corporation Commission.'"

Your petitioner is advised that prior to the passage of the Act of Congress of February 13, 1925, entitled "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes," it was, and independently of the provisions of said Act it now is lawful and proper that an order be entered by this Honorable Court substituting as a party to this cause, appellee in this Court, defendant in the Court below, the

aforesaid Ed. C. Tafoya, member of the State Corporation Commission of New Mexico, in lieu of the appellee, J. M. Luna, formerly but no longer a member of the State Corporation Commission of New Mexico. (*Irwin vs. Wright*, 258 U. S. 219, 224-226, and cases there cited.)

3. Chapter 135 of the New Mexico Laws of 1925 entitled "An Act relating to insurance and to codify the insurance laws of the State of New Mexico" was approved March 20, 1925, and took effect from and after its passage and approval (Sec. 77). Section 3 of said act provides, among other things:

> "That all of the powers relating to insurance matters * * * now held by the Bank Examiner * * *, and all records pertaining to insurance now held in the office of the Bank Examiner, be and are transferred to the Corporation Commission, * * *."

Section 2 of said act provides:

> "That a Department of Insurance is hereby created, within the Corporation Commission, the chief officer of which shall be known as the Superintendent of Insurance, and who shall be charged with the execution of the laws relating to insurance."

Section 4 of said act provides:

> "The superintendent shall be appointed and may be removed for cause at any time by the Corporation Commission of the State of New Mexico."

On March 20, 1925, Walter B. Wagner, who then was, ever since has been and now is a citizen of the State of New Mexico and a resident of the State and District of New Mexico, having been duly appointed, duly qualified as Superintendent of Insurance and ever since has been and now is Superintendent of Insurance of New Mexico. As appears from the bill of complaint this cause is a suit brought against the appellee, defendant below, L.

B. Gregg, State Bank Examiner of New Mexico, relating to the present and future discharge of his official duties in respect of the powers relating to insurance matters then held by the Bank Examiner.

4. Section 11 of the aforesaid Act of Congress of February 13, 1925, provides, among other things:

> "Sec. 11. (*a*) That where, during the pendency of an action, suit or other proceeding brought by or against an officer of the United States, * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.
>
> "(*b*) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.
>
> "(*c*) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

5. Your petitioner is advised that the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, is not an indispensable or necessary party to this cause but would be a proper party, that there is

therefore a substantial need for continuing and maintaining this cause against said Walter B. Wagner, Superintendent of Insurance of New Mexico, as the successor in office *pro tanto* of the appellee L. B. Gregg, State Bank Examiner of New Mexico, and obtaining an adjudication of the questions involved, and that by virtue of the provisions of Section 11 of the aforesaid Act of Congress of February 13, 1925, it is lawful and proper that an order he entered by this Honorable Court substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, in lieu of the appellee L. B. Gregg, State Bank Examiner of New Mexico. (See also *Gorham Mfg. Co. vs. Wendell*, 261 U. S. 1, 4.)

WHEREFORE, your petitioner moves this Honorable Court to enter an order substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Ed. C. Tafoya, a member of the State Corporation Commission of New Mexico, in lieu of the appellee J. M. Luna, formerly but no longer a member of the State Corporation Commission of New Mexico, and also substituting as a party to this cause, appellee in this Court, defendant in the court below, the aforesaid Walter B. Wagner, Superintendent of Insurance of New Mexico, in lieu of the appellee L. B. Gregg, State Bank Examiner of New Mexico.

And as in duty bound your petitioner will ever pray.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Petitioner.

CHAS. MARKELL,

Counsel for Petitioner.

State of Maryland, City of Baltimore, ss.:

I HEREBY CERTIFY that on this 27th day of August, 1925, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Charles R. Miller, President of Fidelity and Deposit Company of Maryland, petitioner in the aforegoing petition, and made oath in due form of law that the matters and facts stated in the aforegoing petition are true as stated, to the best of his knowledge, information and belief.

As witness my hand and notarial seal.

WILLIAM M. REINHARDT,
Notary Public.

(My Commission expires May 2, 1927.)

We hereby admit service of a copy of the aforegoing petition and consent to the passage of an order as prayed.

J. M. LUNA,
Formerly a member of the State Corporation Commission of New Mexico.

ED. C. TAFOYA,
Member of the State Corporation Commission of New Mexico.

L. B. GREGG,
Formerly State Bank Examiner of New Mexico.

WALTER B. WAGNER,
Superintendent of Insurance of New Mexico.

JAMES N. BUJAC,
Assistant Attorney-General of New Mexico, Counsel for Appellees and for Ed. C. Tafoya, a member of the State Corporation Commission of New Mexico, and Walter B. Wagner, Superintendent of Insurance of New Mexico.

BRIEF FOR APPELLEES

Office Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1924

No. 88

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APPELLANT,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

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BRIEF FOR APPELLEES.

INTRODUCTION

The writer of this brief enters upon his task with considerable diffidence in view of the importance of the question involved and the personal situation of the writer. The writer was Attorney General of New Mexico at the time this case was decided by the United States District Court but his term has since expired and he is now a District Judge of New Mexico. On the perfection of this appeal it develops that the present Attorney General of New Mexico is seriously ill in a distant state and that his assistant, who is a newcomer to the office, knows nothing about the case. Under these circumstances the

writer has consented to prepare this brief during the stress of a busy court term. The writer ventures to hope that perhaps the Attorneys General of some of the other states which have laws similar to the one involved in this appeal will see fit to intervene and give this honorable court the benefit of their views. It is unfortunate that the decision of this momentous question which affects so many states of the Union should rest in part upon the efforts of the writer of this brief.

JURISDICTION.

A considerable portion of appellant's brief is devoted to the question of jurisdiction. The State of New Mexico, from the beginning, questioned the jurisdiction of the Federal Court to entertain complainant's bill on the ground that this is a suit against the State. The State of New Mexico is quite willing to join issue with the appellant upon the merits of the controversy if necessary, but the State is at a loss to understand how the appellant can successfully hurdle the jurisdictional obstruction which the appellant itself has erected. The existence of jurisdiction must be determined by the plain averments of appellant's bill, and the appellees are astonished at the form and allegations of appellant's pleading. Appellant's bill complains of the construction given by certain state officers to certain statutes of the State of New Mexico, but when appellant appears in court it attacks the validity of the statutes themselves. This is a question of pleading and appellees think the appellant should be bound by the plain affirmations of its bill. A painstaking scrutiny of the allegations of the bill discloses that nowhere is a single allegation that the statutes in question are in fact invalid and unconstitutional but, on the contrary, the appellant alleges with what appears to be deliberate intention that the constructions and interpretations given the statutes by the var-

ious state officers are the things which are invalid and of which appellant complains. The first six paragraphs of the bill are devoted to formal allegations concerning the parties, the various statutes involved and the fact that appellant does business in the State of New Mexico. The allegations of matters of which appellant complains begin with the seventh paragraph where it is stated that the Bank Examiner of New Mexico asserts that the statutes of New Mexico "*as so construed by him*" require the suspension of the appellant from the State. The eighth paragraph recites that the appellant company at a hearing before the State Corporation Commission objected to the validity of the statutes "*as so construed and applied*" by the state officers. The ninth paragraph alleges the decision of suspension. The tenth paragraph alleges the threatened suspension of the Company under the statutes "*as so construed and applied by said defendants.*" The eleventh paragraph alleges that the statute of New Mexico "*If construed and applied as the defendants construe and apply it*" will deprive the appellant of due process of law, etc. The twelfth paragraph alleges irreparable loss and damage. Thus, in brief, run the allegations of appellant's bill which it brings before this court. The bill indicates on its face not a mere careless failure to allege the invalidity of the statute of New Mexico but discloses an apparently purposeful avoidance of any such direct allegation, and the entire complaint of the appellant is directed to the acts of the various state officers and to their constructions and applications of the State statutes. The appellant has created this situation itself. It elected to file a bill which questions merely the administrative and executive acts of certain officers, their methods of proceeding and their constructions and interpretations of state statutes, instead of questioning the validity of the statutes themselves.

It is an axiomatic proposition that such an attempted

action is abortive and is in fact an attempted action against the State. This proposition requires no citation of authority.

> "No case can be found where an injunction against a state officer has been upheld where it was a conceded that said officer was proceeding under a valid state statute." (*Harkrader v. Wadley*, 172 U. S. 148).

In the instant case while there is in the Bill no direct concession that the statute itself is valid, yet the failure to allege its invalidity and the fact that appellant bases its complaint solely and exclusively upon the construction given the statute by the various state officers is, of course, tantamount to a concession of the validity of the statutes themselves. It is too clear for argument that a suit against an officer of the state to enjoin him from instituting prosecutions under a state statute on the ground that he is proceeding under an erroneous construction of the law which would render it invalid and in violation of the Constitution of the United States, is one, in effect, against the State of which a Federal Court is denied jurisdiction by the Eleventh Constitutional Amendment. Such is the decision in *Arbuckle v. Blackburn*, 113 Fed. 616. In the case just cited the Court said:

> "It is urged that this statute 'construed as respondent claims it should be' is in conflict with the Fourteenth Amendment to the Constitution. * * * The argument is that conceding for this purpose that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. * * * The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary, the Supreme Court in more than one instance has denied such jurisdiction to a court of equity."

It is difficult to understand why appellant has placed

itself by its own complaint within the fundamental rule above quoted. As has been stated heretofore in this brief, it is a matter of some astonishment that appellant should deliberately and positively frame its Bill of Complaint so as to indicate to the court to which it applied that the court could not possibly have jurisdiction in the cause. As we read the brief of appellant, it seeks to derive some comfort on the jurisdictional difficulty from certain language in the answer of the appellee, but certainly no jurisdiction could be conferred upon the court by any answer of appellees' where the bill of complaint shows affirmatively that the court has no jurisdiction, and in any event there is no language in appellee's answer which supplies any deficiency in appellant's complaint. The objection to the jurisdiction of the court was not only particularly and sufficiently raised by the apellee's answer, but is still raised here.

While appellees do not conceive that this honorable court will entertain this cause, yet precaution dictates that we should proceed to a discussion of the merits.

THE STATE HAS THE RIGHT TO REGULATE FOREIGN INSURANCE COMPANIES

The first division of appellant's brief on the merits is devoted to an elaborate review of the decisions of this Court touching the powers of the states to regulate foreign corporations and impose conditions on their entrance into the state. Beginning with the earlier cases the brief presents the case of *Allgeyer v. Louisiana*, and then dwells upon the overruling of *Security Mutual Ins. v. Prewitt* by the recent case of *Terral v. Burke Contr. Co.* 257 U. S. 529, which will be hereafter referred to as "the *Terral* case."

Appellant states that if in the opinion in the *Terral* case there be substituted for the words "resorts to the

federal" a more general expression, *e.g.* "exercises a federal constitutional right," then the opinion would be applicable to the instant case. From this voluminous discussion appellant makes the conclusion that a state may not impose upon a foreign corporation terms which involve the surrender of a constitutional right. And this conclusion, it is claimed by appellant, is cinched by the *Terral* case.

We shall not enter into a clamorous argument with appellant over what this Court meant to decide in the *Terral* case. We doubt whether the appellant can tell this Court the scope or proper interpretation of its opinion and we know that we can not. The *Terral* case was concerned with the question of the prohibition by the state of a foreign corporation's right of removal to the federal courts and whether this Court intended by its decision to cover all constitutional rights we do not know. Several alternatives may be suggested. It may be that the *Terral* case decided that considerations of public policy forbid the denial of entrance of litigants into any proper court. It may be that the decision was founded on the broad political principle that a state can not obstruct the functions of the federal government or its agencies. It may be that the case intended to decide just what appellant claims. It may be proper to suggest that the courts which have occasion to apply the *Terral* case have almost all confined its application to the proposition that a state can not interfere with the jurisdiction of a federal court. *Central Union Fire Ins. Co. v. Kelly* 282 Fed. 772; *Chicago M. & St. Paul Ry. v. Schendel* 292 Fed. 326; *Maxwell v. Hicks* 294 Fed. 254; *Twohy Brothers Co. v. Kennedy,* 295 Fed. 462 (Dissenting opinion); *Foy & Shemwell v. Georgia-Alabama Power Co.* 298 Fed. 643. It should also be stated however that several cases are to be found where it is baldly stated that no state can deprive a foreign corporation of a constitutional right as a condition precedent to

doing business within the state. It may further be suggested that perhaps the Chief Justice intended a limited application of the rule stated in the *Terral* case because of his citation of the cases of *Paul v. Virginia* 8 Wallace 168 and *Hooper v. California* 155 U. S. 648 with approval in his latest opinion in the case of *National Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71.

In the case of *Paul vs. Virginia,* it will be recalled that Mr. Justice Field said:

> "Now, a grant of corporate exsitence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle,* 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And in the *Hooper* case, Mr. Justice White said:

> "Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in

> business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an Act of Congress, and has become a lawful agency for the performance of governmental or quasi governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority. The reasons upon which the exceptions to the general rule are based have been often explained."

In the recent *Wanberg* case by the Chief Justice, however, it was held that the condition imposed upon the foreign corporation was not in fact a deprivation of a constitutional right. At any rate the appellees do not intend to assault this court with any blatant claim that the *Terral* does not mean what appellant urges. We take it that this Court will say whether it intended a limited or a broad application of the rule laid down without assistance from the appellees or the appellant. It is important that the position of this Court be clarified and the states informed of the extent of their right to deal with foreign corporations. The states are entitled to know whether the long asserted power of absolute regulation and imposition of such conditions as they please to demand is at an end. The states are entitled to know whether this long asserted power has been reduced to the single power of exclusion in the first instance or whether that too has been taken away. If the rule of the *Terral* case is to be extended to include every constitutional right as appellant contends then it seems likely that the application of the "equal protection of the laws" clause of the constitution will create a perfect parity between foreign and domestic corporations resulting in the complete abrogation of the power of the states to regulate foreign corporations as such. We hope this Court does not intend to wipe out the powers of the states in this regard. Con-

fronted with the *Terral* case we can only borrow the words of Mr. Chief Justice Holmes in *Commonwealth v. Nutting* 175 Mass. 154 shortly after the decision by this Court of *Allgeyer v. Louisiana:*

> "We bow to the decision and even to the intimations of the case cited, without criticism. But that case expressly leaves intact the settled power of the state to impose such conditions as it pleases upon the doing of any business by foreign insurance companies within its borders."

THE NEW MEXICO STATUTES INVOLVED IN THIS APPEAL DO NOT IN FACT REQUIRE THE SURRENDER OF ANY CONSTITUTIONAL RIGHT

The New Mexico statutes involved in this appeal and fully cited in the record and appellant's brief constitute a familiar type of "Resident Agent Laws" enacted by many of the states. At least twenty-seven states have resident agent laws containing compensation features similar to the New Mexico provision. The appellant minimizes this circumstance by declaring in effect that the states have failed to pay due heed to the decisions of this court and that the desirability of legislation bears no relation to its constitutionality. It seems improbable that so many states would have enacted resident agent laws with intentional insolent disregard of this Court or in complete ignorance of the law of the land.

It has long since been settled, and is conceded by appellant, that a state acting under its power to regulate the insurance business may require a foreign insurance company doing business in the state to maintain a resident agent within its borders. The reason for such a requirement is not hard to discover. A responsible authorized local person must represent the company and execute its policies as a protection against fraudulent and worthless contracts. Moreover in case of loss, change in rate of

premium, mistake in the policy or bond, transfer of policy, change in risk and the like it is imperative that the citizen have access to some bona fide representative of the company with power to act, and bind his principal.

If the state possesses the power to insist upon a resident agent it likewise possesses the power to make sure that he be a bona fide agent and not a mere dummy or pretended agent. Probably the statutes in question do nothing more than define a bona fide resident agent, *i.e.* —one who receives the commissions on business placed in the state. This requirement is not for the economic advantage of the agent but for the benefit of the public.

Other states impose the requirement in their resident agent laws that the agent shall maintain his principal office within the state. New Jersey has such a requirement and consequently a citizen of New Jersey maintaining an office in New York City to which he commutes daily would not be a qualified agent within the meaning of the New Jersey statute. In other words, the state of New Jersey has the right to insist that the agent maintain his chief office within its borders. This provision of the New Jersey law was doubtless included by way of enforcing the main provisions of the law. It is a provision in aid of the law for the purpose of making sure the agent shall be a bona fide one. The New Jersey law, like the New Mexico law, in a measure defines what a resident agent must be,—in New Jersey he must be a man who actually has his principal office within the state, while in New Mexico he must be a man who collects the commission on the premium. Without these two salutary provisions in the laws of New Jersey and New Mexico it would doubtless turn out that the so-called resident agents of New Jersey would be New Yorkers and the so-called resident agents of New Mexico mere figure heads who would countersign insurance policies and bonds at so much a signature. The issue then as appellees view it

resolves itself into this query: Granting that the State has a right to insist upon a resident insurance agent, can the state make such other reasonable requirements to insure that such resident agent shall be a bona fide one?

In connection with these observations on the necessity of safeguarding the primary objects of the law we think it appropriate to quote additional language of Mr. Justice Holmes bearing on our contention that the compensation requirement of the New Mexico statute is a fair means of insuring a bona fide resident agent and enforcing the law as a whole by rendering it impossible for the insurance company to circumvent the requirement by means of a mere dummy agent.

> "One main object in imposing such conditions in the Commonwealth is to secure people against fraudulent or worthless contracts, and, in case of litigation, to save them from having to go abroad. We assume, until it is decided otherwise, that the power to enforce these objects will be regarded as too important and substantial to be defeated by a device, even tho the device apart from its purpose would only embody common law right." (*Commonwealth v. Nutting* 175 Mass. 154.)

The Supreme Court of New Jersey in the case of *Ferguson v. Tuttle* 112 Atlantic 596 decided in 1921, after noting the decisions of this Court, held the New Jersey statute which prescribes that no insurance company may transact business in the state except thru agents "whose principal place of business is located in this state" is valid legislation which does not abridge any right guaranteed by the state or federal constitutions. Little difference in principle can be discerned between the New Jersey statute and the New Mexico statute for both are designed to insure the presence of a bona fide agent within the state. New Jersey does it by making the agent maintain his *principal* office within the state, while New Mexico does it by insisting that the agent be a person who collects the commissions.

Appellant professes to see in the New Mexico statute some curtailment of the right of contract and some attempted denial of the right of appellant to pay wages to its employees beyond the boundaries of New Mexico. Pages of frenzied argument to this effect culminate in a climax where it is declared that the New Mexico statute is a hundred per cent minimum wage law and also a zero maximum wage law. And with consistent appropriateness appellant cites the *Kansas Industrial Court* and allied cases. We decline to be drawn into the maze.

Appellant seeks to divide the act of placing a bond or policy into *solicitation* and *execution*, and argues that the solicitation if done outside of the state must be paid out of the usual commission. The state recognizes no such segregation and is concerned only with the placing of the policy no matter what separate services or acts preceed it. Any employee "soliciting" New Mexico business outside the state doubtless performs valuable services for the company which the State of New Mexico has no objection to the company compensating. The entire overhead of the company including the services of the president and the efforts of the janitor of the home office likewise contribute in some measure to the placing of the policy in New Mexico. But neither the solicitor nor the president nor the janitor can claim any vested right to participate in the commission which New Mexico insists must go to the resident agent. And whenever services are performed by any outsider they are performed with notice that the resident agent who executes the policy must receive the commission and that the outsider must look to the remainder of the premium for his compensation. The State of New Mexico must insist upon a real resident agent,—a solicitor in Colorado will not do.

Respectfully submitted,

MILTON J. HELMICK,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1925.

Fidelity and Deposit Company of Maryland, Appellant, *vs.* Ed. C. Tafoya, Chairman, and Hugh H. Williams and Bonifacio Montoya, Members, constituting the State Corporation Commission of New Mexico, et al.	Appeal from the District Court of the United States for the District of New Mexico.

[March 15, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought to prevent the State Corporation Commission of New Mexico from suspending the right of the plaintiff to do business in that State. A final decree was entered by which it was declared that the defendants intend to suspend that right "for the sole reason that the plaintiff has made payments to its agents in states other than New Mexico in connection with the procurement of business made, written and placed by the plaintiff in New Mexico"; that such payments are unlawful by virtue of § 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the Laws of 1921, and that the section so far as it makes such payments unlawful and authorizes the suspension because of this is constitutional. On this ground the bill was dismissed. The plaintiffs contending that the statute as construed and applied is contrary to the Fourteenth Amendment appealed to this Court.

The statute in question, § 2820 of the Code of 1915 as amended in 1921, purports to make it "unlawful for any insurance company authorized to do business in New Mexico . . . to pay, . . . either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or

writing of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this section shall have its certificates of authority to do business in the State suspended for not less than one year''—the suspension to be removed only upon a written pledge that the section will be observed. This section has been repealed by an act of 1925, which substitutes the more moderate requirement that the policy must be delivered, the premium collected and the full commission retained by an agent in New Mexico, with authority to that agent to employ a licensed non-resident broker to collect the premiums, &c., and to pay him within limits. The question has been suggested whether this repeal does not require us to dismiss the case. But the Constitution of New Mexico provides that 'no act of the Legislature shall affect the right or remedy of either party . . . in any pending case' It is at least possible that the State Courts might hold that the plaintiff was still liable to lose its license on the old ground. Therefore it seems to us just that we should proceed to deal with the further questions raised, as both parties desire.

It is suggested that the District Court had no jurisdiction because the bill does not allege that the statute is unconstitutional, but only that the statute as construed and applied by the defendants is so. But even if the statute did not plainly purport to justify and require the threatened action, or if the bill fairly taken did not import a denial of the constitutionality of the law as applied to this case, the plaintiff still would be entitled to come into a Court of the United States to prevent such an alleged violation of its constitutional rights. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278. *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462.

Coming then to the merits we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania*, June 1, 1925. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350, 358. *Badders* v. *United States*, 240 U. S. 391, 394.

United States v. *Reading Co.*, 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal Court, *Terral* v. *Burke Construction Co.*, 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope*, 235 U. S. 107, 203; *Looney* v. *Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, 646.

The case last cited was one of an attempt to regulate the corporation's payments in another State. By the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the State. The difficulty was fully appreciated by the counsel for the appellee and he therefore sought to limit the generality of the words, at least in the case of agents, and to make out that the object was to prevent the use of dummy agents in the State. It was suggested that agents were paid by commissions at well known conventional rates and that the statute meant to forbid the dividing of these commissions, and in that way to prevent the work being done and paid for elsewhere, while nominal agents in New Mexico were paid small sums for the use of their names. In short it is said the purpose was to secure responsible men to represent the Company on the spot. But whether such an interpretation would save the act or not it is impossible to limit it in that way. It forbids the payment of any emolument of any nature to any person for the obtaining, placing or writing of any policy covering risks in New Mexico. The words go beyond any legitimate interest of the State, and although the decree is based only on payments to agents it does not declare that the payments thus made prevented the payment of appropriate commissions to the agents in the State nor does the statute limit its prohibition in that way.

The determination of the Commission to suspend the plaintiff purported to be based upon a letter written by it in reply to a

notice. In this letter it appeared only that agents or branch offices in other States were paid for services of value by commission on such basis as was agreed upon outside of New Mexico, but not that there was in any case a deduction from appropriate commissions inside the State. The threat and the decree, therefore, test the validity of the statute in its extreme application and furnish no ground for an attempt to read it as meaning less than it says. See further *Palmetto Fire Insurance Co.* v. *Beha*, C. C. A., Second Circuit, November 10, 1925; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1925.

Fidelity and Deposit Company of Maryland, Appellant, *vs.* Ed. C. Tafoya, Chairman, and Hugh H. Williams and Bonifacio Montoya, members, constituting the State Corporation Commission of New Mexico, et al.	Appeal from the District Court of the United States for the District of New Mexico.

[March 15, 1926.]

The separate opinion of Mr. Justice McReynolds.

This cause was begun January 8, 1924. Defendants were the members of the State Corporation Commission and the Bank Examiner. Section 2814, Code of New Mexico, 1915, forbade the carrying on of business within the State by any insurance company "unless it shall procure from the Superintendent of Insurance a certificate stating that the requirements of the laws of this State have been complied with and authorizing it to do business." These certificates expired annually on the last day of February. In 1921 the powers and duties of the Superintendent of Insurance were transferred to the Bank Examiner under general control and supervision of the Corporation Commission.

Section 2820 of the Code, as amended, provided that no foreign insurance company shall transact business in the State except through duly appointed resident agents; declared it unlawful to pay any emolument to a nonresident for obtaining policies covering risks therein; and authorized the exclusion of any company which failed to observe this inhibition.

The bill alleges that although the complainant had been duly licensed to transact business in New Mexico for many years defendants were threatening to suspend the license therefor because of supposed violations of section 2820. It asks a decree declaring

that section unconstitutional insofar as payments to nonresidents for procuring insurance were prohibited; and that defendants be restrained from attempting to revoke or refusing to renew the license certificate.

The act effective March 20, 1925, codified the insurance laws of the State; expressly repealed former statutes regulating the business; transferred the powers of the Bank Examiner to the Corporation Commission, and charged the Superintendent of the Department of Insurance with general administration of the law. It sets up an entirely new system of control and contains no provision concerning payments to outside agents like the one challenged by complainant. It provides: "Upon the application of any insurance company for a license to transact an insurance business in the State of New Mexico, the Superintendent shall immediately satisfy himself that the said company . . . has . . . complied with all the . . . requirements of this Act, and shall thereupon be obligated to issue a license to the said company authorizing it to transact the forms of insurance permitted under its articles of incorporation and authorized under this Act for any one insurance company to transact."

The bill questions the validity of a statute which was repealed in 1925. There is no effective remedy which this or any other court can now grant under its allegations and prayers. The cause has become moot and should be treated accordingly.

Mr. Justice BRANDEIS and Mr. Justice SANFORD concur in this opinion.